County of Hawai'i and stipulate out all of the socio-economic criteria and take only the excess deviation to the HSSC. Final judgment was issued on January 24, 2003 (Page A 50).

On July 22, 2005, the HSSC ruled (Page A 24) that the nonresidents should have been excluded and the excess deviation was a prima facie case of discrimination in violation of the Equal Protection Clause. The HSSC then imposed its own rational state policy of "inclusiveness and equal representation" to justify a total deviation that "slightly exceeds" the 10% threshold due to the illegally included nonresidents, and a further assumption that the RC "considered other valid criteria under section 3-17 of the Charter". The HSSC ruled that the RC's plan was constitutional in a 3-2 decision with a Dissenting Opinion by two Justices (Page A 48).

On September 22, 2005, the HSSC excused the Commission's failure to address the excess deviation "because it was working from the 'total' as opposed to 'resident' population base, which presented only an 8.62% deviation" (Page A 5). The Court allowed de novo evidence from the Defendants but refused rebuttal, de novo evidence on fracturing communities of interest and vote dilution from the original filing from the Plaintiffs. The HSSC reiterated its assumption of "inclusiveness and equal representation" for the illegally included nonresidents. The HSSC rejected the Plaintiffs' argument that "good faith and honesty" were "subsumed" in its assignment of error, and the HSSC stated that it would not have accepted the argument regardless (Page A 13).

REASONS TO GRANT WRIT
by Question Number

1. The ten-percent standard was first articulated in dissenting opinions written by Justice Brennan in the cases of Gaffney v. Cummings, 412 U.S. 735, and White v.

Regester, 412 U.S. 755, in 1973. Justice Brennan stated that substantial equality has been determined to mean a total deviation of 10% or less. By allowing the RC's redistricting plan to stand when the total deviation "even slightly" exceeded the 10% standard, the HSSC violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("Fourteenth Amendment") that provides, in relevant part: "no state shall... deny to any person within its jurisdiction the equal protection of the laws." In 1968, this Court ruled in Avery v. Midland County (390 U.S. 474) that the equal protection principle of apportionment extended to units of local government.

When the HSSC determined correctly and rightly ruled that the nonresidents should not be included in the population base, the true total deviation for the RC's redistricting plan was identified as 10.89% and the RC's plan became constitutionally defective. In their Concurring and Dissenting Opinion on July 22, 2005 (Page A 48), Justice Nakayama and Chief Justice Moon of the HSSC stated,

> "a reapportionment plan that exhibits a total population deviation of more than ten percent presumptively violates the right to equal representation secured under the fourteenth amendment to the United States Constitution. Brown v. Thomson, 462 U.S. 835, 842-843 (1983) (citing Swann v. Adams, 385 U.S. 440, 444 (1967)). That presumption of illegality may only be dispelled by showing that rational public policies outweigh the ill effects of an apportionment scheme that materially enhances the representational power of some at the expense of others. Mahan v. Howell, 410 U.S. 315, 326 (1973)", (page A32).

In Swann v. Adams, 385 U.S. 440-447 (1967), this Court held that, "[T]he State's failure to articulate acceptable reasons for population variances between districts invalidates the reapportionment plan. Allowable deviations from equality of population between legislative

districts are confined to minor variations which "are based on legitimate considerations incident to the effectuation of a rational state policy." Reynolds v. Sims, supra, at 579...", and "[W]e reverse for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts..."

The RC's violation of the Fourteenth Amendment (Page A 55) by including nonresidents began a series of compounding errors. The HSSC's removal of illegally included nonresidents proved a true deviation of 10.89% that violated the Fourteenth Amendment. The excess deviation diluted the votes of permanent residents in 8 of 9 districts. The inclusion of these nonresidents in District 2 forced additional permanent residents to be assigned to other districts causing District 2 to become a district of "supervoters" with the weight of their votes enhanced. This enhancement negatively impacted of voters of 8 of 9 districts in the County who had their votes diluted.

Further compounding the nonresident inclusion error, the RC assigned the most positive district percentage (+4.69%; too many people) to a high-growth area, and the most negative percentage (-6.20%; too few people) to District 2, a slow-growth district. The population bias in the RC's plan dilutes the weight of the vote of residents outside of District 2 for the next ten years. The RC must show that the residents whose votes are diluted by the excessive deviation served a compelling state interest and that the vote dilution is necessary to serve that interest. The RC failed to do so.

In Reynolds v. Sims, 377 U.S. 533, 579 (1964), Chief Justice Earl Warren stated that "mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that they achieve "substantial equality of population among the various districts."

In Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969), this Court rejected the argument, "that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the `as nearly as practicable' standard. The whole thrust of the `as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."

In the dissent of White v. Regester, 412 U.S. 755 (1973), Justices Brennan, Douglas, and Marshall argued against an arbitrary cutoff point because "percentage figures tend to hide the total number of persons affected by unequal weighting of votes".

In Mahan v. Howell, (410 U.S. 315, 1973), this Court held unequivocally, "[F]irst, the paramount goal of reapportionment must be the drawing of district lines so as to achieve precise equality in the population of each district"..."[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of [410 U.S. 315, 340] equal population as is practicable. Reynolds v. Sims, 377 U.S. 533, 577 (1964); see also Kirkpatrick v. Preisler, 394 U.S. 526 at 531" ... "The Constitution does not permit a State to relegate considerations of equality to secondary status and reserve as the primary goal of apportionment the service of some other state interest. Second, it is open to the State, in the event that it should fail to achieve the goal of population equality, to attempt to justify its failure by demonstrating that precise equality could not be achieved without jeopardizing some critical governmental interest... variations in weight accorded each vote can be approved only where the State meets its burden of presenting cogent reasons in explanation of the variations, and even then only where the variations are

small. See, e. g., Abate v. Mundt, 403 U.S. 182 (1971); Kirkpatrick v. Preisler, supra; Swann v. Adams, supra".

Appellant used mapping software that was a subset of the software used by the RC. Appellant obtained State's Office of Elections' population database for Hawai'i County including the information on the 871 nonresidents. 810 (93%) of the nonresidents lived in District 2. Appellant (and another Plaintiff) created an alternate plan and presented the plan to the RC but the RC did not make an honest and good faith effort when it voted against considering the alternate plan with its lower total deviation. The RC voted against the Appellant's plan because of "administrative convenience", even though the Appellant's plan had a lower deviation (Page A 121 and Question 13, Page 25). The RC made no effort to decrease the deviation of its plan or to justify its final deviation. The RC failed to provide any rational state policy that could outweigh the dismal effect of its plan on the residents (vote dilution, creating a district of "supervoters", splitting communities of interest, etc.). Mahan v. Howell, 410 U.S. 315, 326 (1973) stated that the overriding objective in reapportionment must be "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State. Id., at 579."

The RC ignored the mandates of the County Charter without justification, including, "Districts shall have approximately equal resident populations as required by applicable constitutional provisions". The Third Circuit Court erred in allowing the RC's redistricting plan to stand when it included nonresidents in the population base and would exceed the 10% standard if the nonresidents were removed. The HSSC removed the nonresidents but erred in allowing the RC's plan to stand because the total deviation were only "slightly over" the 10% standard for total deviation. The HSSC also erred in overlooking the

compounding errors caused by allowing the excessive deviation to stand.

In other redistricting cases before this Court where the same issues have arisen, this Court has disallowed such violations of the Equal Protection Clause of the Fourteenth Amendment, especially when no justification is provided. Other decisions by this Court set a precedent to overturn redistricting plans that exceed 10% without a rational state policy. Those rulings are correct and this Court should reach the same conclusion in this case and invalidate the RC's plan for exceeding the 10% standard.

2. In the years since Gaffney v. Cummings, 412 U.S. 735 (1973) and White v. Regester, 412 U.S. 755 (1973) that defined the 10% standard for total deviation, computer technology, computer mapping, and redistricting technology have improved dramatically. The HSSC's ruling that the RC's redistricting plan should be allowed to stand because it is "only slightly over the acceptable 10% standard" (10.89%) is not constitutional. "Slightly" was defined by the HSSC as less than 1%.

Today's computer and mapping technology makes it practicable and reasonable to keep the total deviation below 10% and the RC was using that technology in 2001. An alternate plan was submitted by the Appellant to the RC that was in time to meet the December 31, 2001 deadline, in a format compatible to the County of Hawai'i's mapping software, that had a total deviation of 8%, improved compactness, and that did not include nonresidents. The alternate plan proved that the RC could have decreased its original and final deviation.

Swann v. Adams, 385 U.S. 440 (1967), states, "appellants' proposed plan showed the feasibility of measurably reducing population differences between districts". The RC not only voted against considering the Appellant's plan but also failed to reduce its own deviation when it was feasible. Alternate plans with a lower total

deviation should be selected if the RC's deviation is not improved or justified. That did not happen in the Appellant's case. Selecting the plan with a lower deviation results in a more equally-weighted vote that complies with the Equal Protection Clause of the Fourteenth Amendment.

The HSSC's erred in allowing the RC's plan to stand because it was just "slightly" over the acceptable 10% standard when it was feasible with current technology to lower the deviation. This Court should overturn the HSSC's ruling in this case since it is indefensible.

3. The RC produced a plan that diluted the votes of eight districts and enhanced the votes of District 2 (South Hilo) by including 810 of 871 nonresidents in District 2.

The number of permanent residents for Hawai'i County in 2001 was 147,806. This number divided by the nine Council Districts equals the "ideal" district population of 16,423. The number of nonresidents identified in the State of Hawai'i's data was 871. 810 of the 871 nonresidents (93%) reside in District 2 (South Hilo). 810 nonresidents equal 4.9% of the "ideal" population. Of those 871 nonresidents, 234 are foreign-national students. Foreign-national student information was provided by the University of Hawai'i - Hilo by the Registrar's Office to the Appellant who provided the information to the RC on November 21, 2001 (Page A 102).

Since nonresidents are not permanent residents and the RC counted them as part of the permanent resident population of the District 2, the RC's action reduced the number of permanent residents allotted to District 2 and forced additional permanent residents into other districts in a cascading effect. The reduced number of permanent residents in District 2 became "supervoters". Their individual vote weighs approximately 4.9% more than voters of other districts even if there were no other deviations in population between districts which there were. In contrast to District 2, the other eight districts have the weight of their vote reduced by 4.9%

or more. The Council member representing District 2 had his vote enhanced as well.

In Reynolds v. Sims, 377 U.S. 533 (1964), at 567: "[T]he basic principle of representative government remains, and must remain, unchanged - the weight of a citizen's vote cannot be made to depend on where he lives."

In Swann v. Adams, 385 U.S. 440, 444 (1967), this Court stated, "[T]he State failed to present any acceptable reasons for the population variance between districts...though appellants' proposed plan showed the feasibility of measurably reducing population differences between districts"... "The State's failure to articulate acceptable reasons for population variances between districts invalidates the reapportionment plan. Pp. 443-447." The County (State), not the HSSC, must articulate valid reasons to depart from excepted and mandated standards.

Creating a district of "supervoters" should not be permitted. This Court should invalidate the RC's plan for failure to: articulate acceptable reasons for population variances between districts, justify the vote enhancement in District 2, and justify the vote dilution in the other eight districts.

4. The HSSC and/or the Third Circuit Court should not be permitted to allow a redistricting plan to stand where several redistricting criteria in the County Charter were ignored and incumbent protection gerrymandering was in effect. Socio-economic criteria were discussed in the testimony of David Holzman, PhD - Sociology, (October 8, 2001, Page A 88)

a) "Districts shall have approximately equal resident populations as required by applicable constitutional provisions" per the County Charter (Page A 58).

The nine Council Districts designed by the RC do not have approximately equal resident populations within the plus or minus 5% deviation standard or in the overall 10% standard. Although warned by public testimony that their

deviation would exceed 10% with the removal of the nonresidents, the RC failed to justify the excess deviation above 10%. The HSSC issued its ruling that nonresidents should not be included in the population base. The RC's plan then had a deviation in District 2 of -6.20% and in District 8 of +4.69%, resulting in a total deviation of 10.89%." (Page A 38)

If the RC had completed the most modest "due diligence" to adopt by vote and follow established criteria for redistricting, the RC could not have strayed so far from protecting voter's rights. The lack of due diligence by the RC culminated in a plan with multiple violations of established criteria.

This Court ruled in the aforementioned cases that the criteria violations (compactness, fracturing communities of interest, incumbent protection, favoring individuals, and exceeding the 10% standard) invalidated those redistricting plans, and this Court should rule the same way in this case.

b) Districts should be contiguous and compact per the County Charter (Page A 58).

This Court set standards for fairness in redistricting. These criteria are listed in "How to Draw Redistricting Plans That Will Stand Up in Court" by Peter S. Wattson, Counsel to the Minnesota Senate and includes the criteria that districts must be compact (page A 174). The RC designed Council Districts that were not as compact as is practicable.

In Hawai'i County's 1991 redistricting, Lower Puna had its own Council District. Council District 6 included Hilo and Upper Puna and extended for 118 miles across the Island of Hawai'i to join three separate communities of interest - Upper Puna (east side), Ka'u (south), and South Kona (west side). By 2000, population increases in Upper and Lower Puna justified two Council Districts (1.906 seats) that included a Council seat for Upper Puna.

In 2001, the RC insisted on retaining the basic shape and size of District 6 which required the continued fracturing of

the Upper Puna community into District 3 (Hilo) and old District 6 which is still is 118 miles across. This extreme distance and the fracturing of Upper Puna are no longer reasonable, rational, or justified with the population increase in Puna.

Compactness is no longer just a geometric measurement. In the case of Reapportionment of Town of Hartland, 160 Vt. 9, 21-22 (1993), the Vermont Supreme Court stated that, "[C]ompactness and contiguity requirements ultimately concern "the ability of citizens to relate to each other and their representatives and ... the ability of representatives to relate effectively to their constituency." (Wilson v. Eu, 1 Cal.4th 707, 4 Cal.Rptr.2d 379, 387, 823 P.2d 545, 553, 1992). The ability of Puna and Kona citizens to relate to each other and to their representative continues to be strained due to the 118 miles encompassed by District 6 in the RC's plan and is today unjustifiable as it was in 2001.

c) Districts should attempt to preserve communities of interest.

In "How to Draw Redistricting Plans That Will Stand Up in Court", Mr. Wattson, includes the criteria that districts should attempt to preserve communities of interest (pages A 174).

In Miller v. Johnson, 515 U.S. 900, 919-20 (1995), the U.S. Supreme Court expanded the fairness criteria to include "respect for . . . communities defined by actual shared interests."

In Kenai Peninsula Borough v. State, 743 P.2d 1352 (Alaska 1987), the Alaska Supreme Court recognized that a reapportionment plan that unnecessarily divides a municipality in a way that dilutes the effective strength of voters "by invidiously minimizing that class's right to an equally effective vote" will raise an inference of intentional discrimination.

The RC not only fractured the Puna community that deserved two Council Districts based on its population, it also split the village of Waimea. The overwhelming public testimony from the Puna and Waimea communities was their desire to keep their neighborhoods and communities together. Both of these community fractures were unnecessary as proved in the Appellant's plan but the RC's plan prevented both Upper Puna and Waimea from voting as a community and diluted the effective strength of their respective voters. Both communities objected to the RC's plan to no avail.

In the Motion for Reconsideration (Civ. No. 01-1-0092) on September 22, 2005 (Pages A 8 -12, A 18), the majority of the HSSC referenced Appellant's arguments on "communities of interest", the fracturing of the District of Puna, and vote dilution, but regardless, allowed the RC's plan to stand.

d) Incumbency Protection Gerrymandering and the Charter's criteria of "No district shall be drawn to unduly favor or penalize a person or political faction" (A 58).

In Ely v. Klahr, 403 U.S. 108 (1971), this Court held that "the incumbency factor has no place in any reapportionment or redistricting".

The RC's plan protected all nine incumbents inside their respective Council districts and advantaged them by protecting them from facing each other in the next election. The RC violated the County Charter because incumbents were favored by the RC's plan with protection from other incumbents.

In Black's Law Dictionary (Seventh Edition), a political subdivision is defined as a, "[d]ivision of a state that exists primarily to discharge some function of local government." Political subdivisions include: county, city, township, judicial district, school district, etc. There is nothing in Black's definition to indicate that the location of an incumbent's residence is considered a "division of a state"

or a "function of local government" that should be protected so that the incumbent could stay in his/her same council district or be shielded from running against another incumbent if district boundaries ever change. Incumbents do not own their council districts nor have any right to expect that redistricting will retain them inside of new district boundaries. The very purpose of redistricting is to level the field for future elections.

Dr. Michael McDonald of the "United States Election Project" (Page A 147) advises, "The goal of an incumbent protection gerrymander is to secure re-election for incumbents... Incumbent protection gerrymanders tend to produce the least competitive elections. "He stated that in "incumbent-blind" redistricting, those drawing the maps cannot know the location of the incumbent's residences and improves competitiveness.

The RC violated the principle of Ely v. Klahr's "incumbency factor" and the County Charter's criteria to not "unduly favor or penalize a person or political faction" (Page A 58), without justification. The final design of the RC's plan indicates that the RC had a non-publicized and unjustified criterion of incumbent protection rather than achieving fair redistricting. The results of the RC's plan speak for itself.

5. The HSSC allowed the RC's plan to stand although the RC ignored documented growth rates. The RC placed the most positive deviation percentage (+4.69%; too many people) in areas of high growth and the most negative deviation percentage (-6.20%; too few people) in District 2, an area of low growth, thereby exacerbating the vote dilution already caused by inclusion of 810 nonresidents. The RC's decision occurred despite the public's testimony about high growth areas needing the lowest percentages of deviation so that over the years between the 2000 and 2010 census, the population deviations will equalize as well as

the weight of each vote (Page A 102). With the RC's plan, the vote dilution will be exacerbated over the next ten years.

In the Appeal from the Third Circuit Court (Civ. No. 01-1-0092) on July 22, 2005, the HSSC noted the Council Districts whose votes were enhanced or diluted by the RC's plan, "According to Appellants' calculations, the resident population of District 2 was -6.20% below the ideal mean (the latter category) and the resident population of District 8 was +4.69% above the ideal mean (the former category), thereby resulting in a total deviation of 10.89%" (page A 38).

Growth rates in Hawai'i County are well documented in the County's 2000 Data Book which was available to the RC (Page A 222). In Kirkpatrick v Preisler, 394 U.S. 526, 535 (1969), this Court held, "[W]here population shifts can be accurately predicted, States may properly consider them and apply them... but throughout the State in a systematic manner"... "Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them... Findings as to population trends must be thoroughly documented"... The District Court found "no evidence . . . that the . . . General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district, in enacting the 1967 Act." 279 F. Supp., at 983.

This Court should invalidate the RC's plan for failure to use documented growth rates as a criterion, and the RC's use of deviations wrongfully applied to high- and low-growth areas that will exacerbate population deviations for the next ten years.

6. Some Federal laws and U.S. Supreme Court case precedents regarding redistricting have been extended to include municipal governments (Reynolds v. Sims, 377 U.S. 533, 1964). This Court determined that under the Fourteenth Amendment's Equal Protection Clause (Page A

55), the "one person-one vote" standard must be met in any redistricting plan. Mandated State and/or County redistricting criteria should also be incorporated into the 2001 RC redistricting plan unless legal justification for not doing so is provided.

The decisions of this Court when applied exactly to the same points of law in another case are considered to be binding on all other courts of the United States (stare decisis). Trial courts are required to view the decisions of higher courts strictly. By extrapolation, the redistricting plan of the RC (a governmental agency) should also use the same constitutional laws and mandated precedents to protect our most basic right - the right to an equal vote.

The RC was very cognizant of mandated redistricting criteria requirements but refused to apply them (Page A 72). The RC tried to avoid, violate, or ignore constitutional and case law, and partially disenfranchised most of the Hawai'i County voters. (See Questions 1, 2, 3, and 4.a.)

If this Court does not require the RC to incorporate the federally extended mandates, laws, and precedents and also invalidate the RC's unjustified plan, then other agencies may claim that they are excused from applying Federal, State, and local redistricting criteria as well. There can be no assumption that the RC followed mandated criteria and laws. The fact is that those mandated criteria and laws were not incorporated into the RC's redistricting plan nor were the deviations justified.

This Court should invalidate the RC's plan for failure to incorporate: a) Federal law and binding precedents that must be followed by the smallest governmental units, and b) County mandates. This Court should rule that the foregoing Federal law, binding precedents, and County mandates are required to be incorporated into Hawai'i County's redistricting plan and further, into the County Charter as mandates, not guidelines, to prevent future illegalities.

7. The RC should be required to publicly and formally adopt, as close to the inception of the redistricting process as practicable, all redistricting policies to which it must adhere, and provide those policies in writing as part of the submission of the RC's final redistricting plan. The RC was advised that it needed to choose those policies by which to reapportion Hawai'i County. Dwayne Yoshina, Chief Election Officer for the State of Hawai'i advised the RC on May 3, 2001 during the RC's first meeting, "...[w]hat I would suggest is that you take that time and you form all your policy decisions" (Page A 64).

The RC had ample information and ample time to formally adopt legal redistricting criteria against which to assess its plan for legality and fairness standards. This failure indicates gross incompetence, some motive to prevent the residents of the County of Hawai'i from having a fair redistricting plan, and/or a hidden agenda. Certainly, an appearance of impropriety exists and the illegality of the RC's plan speaks for itself.

With the exception of voting to illegally "include all people" (nonresidents) on June 22, 2001 (Page A 67-68), the RC failed to define any other policy nor did it describe "include all people" as equal representation. Perhaps, the failure to adopt policies misled the RC into believing that any private agenda was permitted or any decision that it made was justified. The public testified repeatedly that the RC was making legal mistakes. The RC had at least three licensed attorneys as Commissioners including Commissioner Van Pernis who made the motion to "include all people". The RC still refused to follow legal precedents and law.

The Appellant started with no knowledge of reapportionment or redistricting. In a search of the internet, a document titled, "How to Draw Redistricting Plans That Will Stand Up in Court " by Peter S. Wattson, Counsel to the Minnesota Senate, 2002 (Page A 156), was discovered. This

document was used by the Appellant to determine appropriate criteria from which the Appellant's redistricting plan was designed. The Appellant's case makes a strong argument that if members of the public can educate themselves to understand fair redistricting and produce an alternate plan that meets mandated criteria, then there is no reason that a governmental agency should do less.

To require that the RC establish redistricting criteria at its inception (before establishing boundary lines) and to follow those criteria is the minimum requirement for a fair redistricting plan. To allow less, would be to imply that redistricting laws and binding precedents are discretionary and not imperative on the RC.

If all laws, criteria, and precedents required for Hawai'i County redistricting had been identified and adopted, it would have been obvious to the RC, not just the public, that the RC strayed widely from its sworn duty to provide a fair and honest reapportionment. Additionally, the intent of the RC's decisions would have been clear to the HSSC since there would have been a list of criteria adopted against which to assess the RC's final plan. There were no legal criteria adopted and no justification for having none submitted with the RC's final plan. The HSSC upheld the RC's plan based on incorrect information, hearsay evidence, statements from incumbent Councilmembers (non-Commissioners), and assumptions of intent. The Appellant's case proved that there was a need for the RC to define its methodology whereby the RC adopted, then used criteria to enable it and the public to determine if the redistricting results were valid. This Court should invalidate the RC's plan for its failure to establish, adopt, and use legal redistricting policy and criteria.

8. The mere mention of valid criterion by a single or even multiple Commissioners, or non-Commissioners should not constitute rational consideration, a "rational state policy", adoption of the criterion, or even

acceptance of the criterion by other Commissioners. Without a public discussion, and especially a vote of the redistricting agency's members, no one can know the thinking or acceptance level of each of the Commissioners. In every case of a criterion mentioned, the question should be asked; did the majority of the RC agree that each criterion is valid, adopted, and used to measure the correctness and legality of the RC's plan? Without knowing the thoughts of each Commissioner by their statements and votes, the correct answer to the question is unknown because there is no definitive evidence. Because the HSSC cannot and does not know the thoughts of the Commissioners, who did not speak on each criterion mentioned, and the Commissioners did not express their thoughts through a vote, the HSSC has no basis for the assumptions it used to explain the failures and errors of the RC.

The RC knew that it should abide by the County Charter, Section 3-17 (Page A 58), criteria as the criteria were commented on by Chairperson Van de Car on October 8, 2001 (Page A 70). However, the criteria were not adopted by the RC and three of the four mandated County Charter criteria were violated in the RC's plan design (Page A 58). Therefore, an assumption that the RC considered and/or used the criteria is not valid.

The HSSC on July 22, 2005 held that the RC's plan had "a total deviation of 10.89%, such a deviation in this unique instance (a) was minimal, (b) apparently included the Commission's consideration of other valid criteria under section 3-17 of the Charter"(Page A 25). Applying the phrase 'unique instance' and 'apparently' indicates assumptions that do not justify the violation of the Equal Protection Clause of the Fourteenth Amendment (Page A 58). Assuming to know the Commissioners' minds without a vote would be tantamount to mind-reading.

The RC never provided proof to the Third Circuit Court or the HSSC that they adopted legal criteria or a rational

state policy to justify its violations. The mere mention of a criterion without a vote should not be accepted as consideration or adoption of criteria, or a rational state policy. This Court should overturn the HSSC's imposed and unjustified "rational state policy" based on the mention of criteria rather than adopted and incorporated criteria.

9. The HSSC erred in imposing a "rational state or public policy" of "inclusiveness and equal representation" on the RC's redistricting plan when the RC failed to provide a formally adopted, written policy, or justification. The RC approved a motion to "include all people" (Page A 68) but never stated that the motion promoted "equal representation". It is the RC's constitutional responsibility, not the Court's burden, to provide formally adopted and written criteria with supporting evidence that justifies a plan that exceeds the 10% standard or deviates from any other criteria, standard, precedent, or law.

A serious problem exists in allowing the HSSC to use facts not in evidence in the RC's plan as justification for the RC's actions or lack of actions. This would set a precedent for other redistricting agencies that a court can supply an assumed, after-the-fact justification for erroneous redistricting if the agency does not supply a justification of its own.

In Swann v. Adams, 385 U.S. 440-447 (1967), this Court held that, "[T]he State's failure to articulate acceptable reasons for population variances between districts invalidates the reapportionment plan. "

The Appellant's case underscores the need for the Court to require written documentation from redistricting agencies on policy, criteria, and justification for deviations and divergences from legal standards in even the smallest governmental units. The HSSC's imposed "rational state policy" cannot be defended by the record and should be overturned by this Court.

10. The HSSC erred in making an assumption that the RC "evidenced an intent to achieve inclusiveness and equal representation" or a "rational state policy" (Appeal from the Third Circuit Court, July 22, 2005, Page A 25). The basis for the HSSC's imposed "rational state policy" was: a) incorrect and hearsay statements made by Commissioner Van Pernis on the number of military personnel with no mention of other nonresidents (Page A 68), and b) followed by that Commissioner's motion to illegally "include all people"(even the nonresidents).

Commissioner Van Pernis' hearsay testimony grossly underestimated the nonresident population that he provided to the RC ("20-30 people currently stationed here") on June 22, 2001 (Page A 68). This incorrect and hearsay evidence was contradicted by public testimony (Page A113) and proved incorrect by the State Office of Elections' data. Such testimony should be discounted completely and no assumption of "inclusiveness or equal representation" should be construed from such evidence.

The total number of nonresidents according to the State of Hawai'i, Office of Elections' data was 871. Of those nonresidents, 234 of the nonresidents are foreign-national students. Foreign-national student information was provided by the University of Hawai'i - Hilo, Registrar's Office, to the Appellant who provided the information to the RC. 810 of the 871 nonresidents (93%) reside in the single Council District of South Hilo (District 2). 810 nonresidents equal 4.9% of the "ideal" population.

The RC was very aware of the probability that the State Reapportionment Commission would disallow nonresidents in the State population base. David Rosenbrock was introduced to the RC as the Project Manager for the Hawai'i State Office of Elections on May 3, 2001 (Page A 64). During that meeting, Mr. Rosenbrock advised the RC regarding nonresidents, "Well, I'm almost positive they're going to be minused out." The nonresidents were minused out by the

State in August 2001 but the RC did not reconsider their decision to include the nonresidents even though the Appellant notified the RC on November 21, 2001 (Page A 113) of the State's action.

The HSSC made mention of the comment to "include all people" made by Commissioner Van Pernis (Page A 68). The HSSC assumed the passage of a motion to illegally "include all people" (even nonresidents) evidenced an intent to provide "inclusiveness and equal representation", but including foreign nationals, nonresident military, nonresident military dependents, and nonresident students does not embrace the concept of inclusiveness in redistricting which is reserved for permanent residents. The RC never discussed or used the terms "inclusiveness" or "equal representation". Equal representation was denied to the permanent residents by the inclusion of nonresidents because the inclusion of nonresidents created enhanced votes for some permanent residents and diluted votes for other permanent residents.

The HSSC excused a 10.89% deviation although the RC never reconsidered excluding nonresidents when confronted with the true facts (Page A 113). Then the HSSC imposed its own "rational state policy" that stated the RC was trying to provide "inclusiveness and equal representation".

In their Dissenting Opinion on September 22, 2005, Chief Justice Moon and Justice Nakayama discussed the framework for assessing the constitutionality of a redistricting plan stated,

> "...The foregoing framework for assessing the constitutionality of a redistricting plan pragmatically acknowledges that government must, in certain circumstances, be allowed to pursue redistricting policies that incidentally enhance the representational power of some members of the electorate at the expense of others. It was never intended to function as a curative device for excusing, after the fact, a

reapportionment authority's gross computational errors or inadvertent methodological mistakes -- especially where, as here, those missteps were solely responsible for tainting the redistricting plan with the presumption of unconstitutionality." (Page A 20-21)

Equating "inclusiveness" of nonresidents (e.g. foreign nationals, U.S. nonresidents, etc.) to "equal representation" contradicts the very principles of redistricting. It invalidates the redistricting process and condemns the ultimate plan to be unconstitutional. The RC actually gave nonresidents "double representation", in their home state or nation and in Hawai'i County as well, to the detriment of the permanent residents. This Court should overturn the HSSC's decision to impose its own rational state policy of "inclusiveness and equal representation" to support the RC's plan that illegally included nonresidents.

11. The RC voted against even considering the Appellant's plan that had a lower deviation than its own plan and it also failed to justify the inclusion of nonresidents. The reason for not considering the Appellant's plan was given by Commissioner Ferguson on December 18, 2001, "[w]e did hear all of your arguments, you were not shut out, we listened to whatever you had to say, we just don't agree" (A143).

In Ziols v. Rice County Board of Commissioners, No. C3-02-1667 (Minn. App. May 20, 2003), the Court of Appeals affirmed the decision of the Judge of the district court that, "[T]he failure of the county board to give a reason for not adopting one of the 12 other plans that were more equal in population was an abuse of its discretion". "[W]hile the board was not required to pick the plan with the lowest population deviation from the ideal, it must explicitly address all of the statutory factors, particularly equal population. Slip op. at 13."

In both the Appellant's case and Ziols v. Rice County, the Commissions did not justify its adoption of a plan

containing greater population deviations than other available plans offered. If anything, the Appellant's case is even stronger due to the deliberate inclusion of nonresidents, most of whom (93%) are located in District 2 (South Hilo). The RC abused its discretion by voting against even considering an alternate plan with lower deviations, did not adopt an offered plan that had a lower population deviation, did not adjust its own deviations, and did not explicitly address all statutory factors. The precedent set in Ziols v. Rice County is reasonable and just as a method of obtaining plans that comply as closely as practicable with the Equal Protection Clause of the Fourteenth Amendment (page A 55). This Court should rule that the failure to explicitly address all statutory factors, and the abuse of discretion in voting to not consider an alternate plan with lower deviations, invalidates the RC's plan.

12. The RC should not be permitted to vote against even considering an alternate plan that was presented in ample time and had a lower deviation, greater compactness, no nonresidents, and met established criteria and precedents. On October 18, 2001, Appellant and Charles Flaherty presented an alternate redistricting plan. The total deviation of Appellant's plan was less than 6% initially. The RC did not ask any questions of either of us (Page A 101). The Commissioners continued to make changes to its plan based on 1991 Council Districts. Public testimony during the session supported the alternate plan.

On November 21, 2001, Appellant presented slight modifications to the Appellant's plan (deviation of 8%) and more information for the basis of the Appellant's plan. After the presentation, Commissioner Lisa Barton made a motion to consider the Appellant's plan. The motion failed. (Page A 120) The Commissioners again continued to make changes to the RC plan based on 1991 Council Districts. Public testimony continued to support the Appellant's plan.

At the last RC session on December 18, 2001 (Hawai'i County RC meeting), Al Konishi, County Clerk and a licensed attorney, advised, "If you make any major changes to this [RC's] map that is behind you, they are not going to make the deadline"... "if you make major changes, whether it may be the CERG [Appellants] map, Mrs. Jacobson's map, maps 1-9, you make major changes today, you're gonna have a very difficult time making a December 31st deadline" (Page A 137, 142). The RC did not request any advice from Corporation Counsel. A motion was made and passed on December 18, 2005 to adopt the RC's plan without knowing the total population deviation. Passing a plan to accommodate the Elections staff responsible for completing the boundary descriptions and using the mandated deadline as the reason is a poor excuse for illegal redistricting. If criteria used for the RC's plan and the Appellant's plan been matched and population deviations compared using due diligence, it would have been obvious that the RC's plan would have failed scrutiny.

This Court should rule that without due diligence, it is not permitted to vote against even considering an alternate plan with a lower deviation.

13. The HSSC chastised the Appellants for raising de novo issues that were stipulated out of the appeal in the January 6, 2003 stipulation to amend First Amended Complaint and for entry of judgment in order to reach the HSSC. Those issues included: failure to use rational or objective methodology, wrongfully submerging communities of interest, and fracturing Puna. The HSSC stated, "While this explanation may have raised a concern, Appellants withdrew these arguments. The stipulation stated: Plaintiffs and Defendants herein stipulate to the amendment of the First Amended Complaint filed here on March 6, 2002 as follows:

1. Plaintiffs withdraw and delete Paragraphs 12.a to 12.f;

2. Plaintiffs withdraw and delete Paragraphs 12.j to 12.n.

The effect of the deletions is to withdraw Plaintiffs' allegations that the County of Hawai'i 2001 Reapportionment Commission failed to use a "rational or objective methodology" (¶¶ 12.a to 12.f) and wrongfully submerged communities of interest into larger districts (¶¶ 12.j to 12.n) but not Plaintiffs' allegations as to the population base that the County of Hawai'i 2001 Reapportionment Commission used (¶¶ 12.g to 12.i and 12.o to 12.p) ". (Page A 9-10)

It is true that the Stipulation withdrew these concerns. The Appellants agreed to withdraw key arguments in order to make a timely appeal to the HSSC. The HSSC sought additional information from the Defendants after granting the Appellants their Motion for Reconsideration. The Defendants responded with erroneous de novo information which the Appellants were not allowed to rebut.

The HSSC stated in its decision (Opinion of the Court, July 22, 2005) that, "Summary judgment is appropriate if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Pac. Int'l Serv. Corp. v. Hurip, 76 Hawai`i 209, 213, 873 P.2d 88, 92 (1994)." "A trial court's conclusions of law are reviewed de novo under the right/wrong standard. Fujimoto v. Au, 95 Hawai`i 116, 137, 19 P.3d 669, 720 (2001). Under this standard, the trial court's conclusions of law are not binding upon the appellate court and are freely reviewable for its correctness. Id." HSSC, Appeal from the Third Circuit Court (CIV. NO. 01-1-0092); (Page A 28).

This Court has the right to review the Third Circuit Court's and the HSSC's conclusions of law, decisions, and any other material involved. The Third Circuit Court did not grant the Appellants the judgment they legally deserved

nor did the HSSC. The HSSC, the Third District Court, and the RC made a multitude of errors that will set an unjustified precedent and that deserve the attention of this Court to correct.

CONCLUSION

The failure to adopt legal policies produced a situation where the RC violated numerous laws and precedents, forced an illegal plan on the residents, and now this Court must sort through the minutiae in documents to determine what the agency might have been using as criteria. It is reasonable to expect that redistricting criteria be publicly discussed and adopted and not left to the imagination.

The RC failed to perform due diligence or to formally adopt criteria, erred in using the wrong population base that included nonresidents, exceeded the 10% standard for total deviation, violated the criteria of compactness and preserving communities of interest, ignored growth as a criteria, included incumbent protection gerrymandering, and diluted/enhanced votes in its plan design. These acts in and of themselves violate the very laws the RC swore to uphold. The flaws in the RC's plan indicate not only a lack of "rational state policy" but a total disregard for the law and the residents who must suffer until 2011 with the RC's plan. The RC hid behind a deadline that would dissolve the RC and possibly, its responsibility. Even presented with factual evidence, the RC refused to reconsider any of its inappropriate actions, votes, or decisions.

The Third Circuit Court erred by allowing the wrong population base to be used by the RC, ignored socio-economic criteria, and allowed the RC's plan to stand when that plan unconstitutionally exceeded the 10% standard for total deviation once the illegally included nonresidents were removed.

The HSSC correctly ruled that the inclusion of the nonresidents was wrong but it erred when it allowed the

RC's plan to stand despite the plan's total deviation exceeding the 10% standard. The HSSC also erred in ruling and imposing its assumption of "inclusiveness and equal representation" based on the incorrect comments of one Commissioner, statements by incumbent Councilmembers, and a vote to illegally include nonresidents. Its reliance on inaccurate, hearsay information disregards the very concepts of truthful evidence and justice in our court system.

If the incorrect decision by the HSSC is not overturned, far-reaching precedents will be set for other redistricting agencies that a court may: assume a "rational state policy" where none exists; impose its own "rational state policy"; provide criteria if an agency fails to adopt public, formal, written criteria; equate "inclusiveness" of nonresidents to equal representation; allow redistricting plans to exceed the 10% standard without justification; allow inaccurate, hearsay testimony as justification for an illegal redistricting plan; allow the redistricting agency to disregard an alternative plan that met constitutional standards, had a lower deviation, and was more compact; assume comments made by one Commissioner are agreed to by all Commissioners; and ignore County, State, and Federal law and precedents, and County mandates in redistricting.

In the Concurring and Dissenting Opinion on the Motion for Reconsideration issued September 22, 2005, Chief Justice Moon and Justice Nakayama wrote:

> "...the majority's opinion, Riley v. Baxter County Election Commission, 843 S.W.2d 831 (Ark. 1992), in no way supports the conclusion that the 2001 County of Hawai'i Reapportionment Commission (Commission) followed a "rational" redistricting policy that justifies what is otherwise an unconstitutional redistricting plan." (Page A 20)
>
> "...Neither Riley, nor for that matter, any of the other cases cited by the majority, endorses the majority's contention that a presumptively unconstitutional

redistricting plan may be "rationalized" when the redistricting authority, due to an unrealized computational error, inadvertently devises a plan that exhibits a total population deviation in excess of 10 percent." (Page A 21)

"...The right of equal representation is far too hard-won a liberty for its erosion to be justified so blithely. Accordingly, I must dissent." (Page A 22)

For the foregoing reasons, the judgment of the HSSC should be reversed and the 2001 RC's plan should be declared invalid. Redesign of that plan needs to be addressed in this case.

I am not seeking to overturn the past elections that were based on the RC's incorrect plan nor am I seeking to overturn any legislation passed by those Councilmembers elected under the RC's plan because such actions would cause havoc for the County of Hawai'i and its residents. As a Pro Se Petitioner, I am not sure that I may request the following actions of this Court and I apologize profusely if I exceed my rights in making these requests.

I respectfully request that this Court:

1) consider the socio-economic criteria de novo,
2) disallow the RC's redistricting plan to be imposed any longer on the residents of the County of Hawai'i,
3) not allow the RC or any of its 2001 Commissioners to have any part of designing a new redistricting plan because of their biases,
4) assign a Special Master to receive testimony and plans from the public,
5) allow State and Federal elections to go forward as planned in Hawai'i County but delay the elections for Hawai'i County offices until a reapportionment plan is accepted by a Special Master,
6) suggest the criteria as set forth in Appellant's Redistricting Criteria (Page A 153) be used in developing the

redistricting plan for Hawai'i County, and any other criterion that the Court deems reasonable, and
7) apply any appropriate, corrective action that the Court deems necessary.

Please help the residents of Hawai'i County obtain a fair and legal redistricting plan and an equal vote.

I thank the Court for its time and consideration of my case.

Dated: December 19, 2005
Brenda J. Ford, Pro Se

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FOR PUBLICATION

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai`i nonprofit corporation; BRENDA J. FORD; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST; RONALD C. PHILLIPS, Plaintiffs-Appellants

and

BEVERLY BYOUK and SANDRA W. SCARR, Plaintiffs-Appellees

vs.

COUNTY OF HAWAI`I; COUNTY CLERK, COUNTY OF HAWAI`I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI`I 2001 REAPPORTIONMENT COMMISSION, Defendants-Appellees

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NO. 25614

MOTION FOR RECONSIDERATION

(CIV. NO. 01-1-0092)

SEPTEMBER 22, 2005

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

(By: Levinson, Acoba, and Duffy, JJ.; With Nakayama, J., Dissenting, With Whom Moon, C.J., Joins)

Plaintiffs-Appellants Citizens for Equitable and Responsible Government, Brenda J. Ford, Stanley A. Boren, Floyd H. Lundquist, Marlene E. Lundquist, and Ronald C. Phillips (collectively, Appellants) filed a motion for reconsideration (the motion) of this court's July 22, 2005 published opinion (the opinion), in which a majority of this court affirmed the decision of the circuit court of the third circuit (the court) to uphold the reapportionment plan of the County of Hawai'i 2001 Reapportionment Commission (the Commission). Citizens for Equitable & Responsible Gov't, No. 25614, slip op. at 25 (Haw. July 22, 2005).

I.

In the motion, Appellants argue that (1) this court cannot substitute its findings for that which the Commission and the court should have, but did not, make, (2) this court cannot refer to the public testimony of Julie Jacobson, a person who is not a member of the Commission, as evidence of the Commission's unarticulated intent, (3) this court's substituted justification for deviations in excess of 10% is no justification at all, (4) lack of good faith and honesty was subsumed in Appellants' assignment of error, (5) the plan is invalid if the plan is constitutionally defective, and (6) this court's conclusion that the court and the Commission erred in using the wrong population base, means that it should simply reverse the court's judgment. Accordingly, Appellants request that this court (1) strike any reference to Jacobson's testimony, (2) strike all references to the purported justification of the Commission for offering a plan with deviations in excess of 10%, (3) reverse the court's judgment, and (4) invite the parties to submit further pleadings as may be appropriate to the amended decision. For the reasons discussed herein, the motion for reconsideration is granted in part as to the reference to the Jacobson testimony, but denied in all other respects. [1]

II.

Addressing first Appellants' second point, the challenge to Jacobson's testimony, Appellants maintain that this court "relie[d] upon the testimony of a person who is NOT a member of the Commission[, Jacobson,] to justify the . . . Commission's action below" and that "[s]uch reliance is inconsistent with" Dines v. Pacific Insurance Co., 78 Hawai`i 325, 893 P.2d 176 (1995). (Capitalization and emphasis in original.) However, the opinion does not state that Jacobson was a member of the Commission, but identifies her as a Hawai`i County Councilmember. It may be assumed that Jacobson's testimony apprised the Commission of how using a total population base can achieve inclusiveness and equal representation. The opinion refers to Jacobson's testimony as follows:

> [W]e cannot say that no rational basis underlay the 10.89% deviation because, akin to the approach exemplified by the commission member's testimony in Riley, the Commission in the instant case, by using "total" population, evidenced an intent to achieve inclusiveness and equal representation.
>
> . . .
>
> For at the second meeting of the Commission, Hawai`i County Councilmember Julie Jacobson testified in favor of "using the population as the basis for the districting," stating that,

each human being has needs for the government serves [sic] and it doesn't matter if you're one day old, if you're 99 years old, if you vote or don't vote, or any other of those variables . . . each person needs to be considered and I think especially with the complexity of infrastructure issues, that we deal with, that's why it's important.

Opinion at 22. [2]

Also, Appellants state for the first time in the motion that Jacobson later retracted the statement quoted in the opinion by rejecting the Commission's plan. It should be noted that Appellants did not challenge Jacobson's testimony in their reply brief, even though Defendants-Appellees, County of Hawai`i, County Clerk, County of Hawai`i, and Lloyd Van De Car, Chairman of the Commission (collectively, County Appellees), cited to Jacobson's testimony in their answering brief. Appellants, therefore, failed to raise Jacobson's supposed retraction of the quoted statement that they tardily do now.

However, it appears that Jacobson had recanted the quoted statement. Appellants state that at the Commission's final meeting on December 18, 2001, Jacobson "rejected her own statement." (Emphasis in original.) Upon review of the record on appeal, it appears that Jacobson's December 18, 2001 testimony was never made part of the record. [3] Appellants have since attached the subsequent Jacobson testimony to their motion as Appendix 32, as well as a declaration by their attorney, which certifies that the attached minutes "are public documents . . . that are found on the County of Hawai'i website at Hawai'i-county.com." Although the subsequent Jacobson testimony need not be considered by this court, see Orso v. City & County of Honolulu, 55 Haw. 37, 38, 514 P.2d 859, 860 (1973) ("[A] question involving evidence not in the record cannot be reviewed on appeal.") (citation omitted), in light of the fact that Jacobson retracted her statement, a fact only now raised by Appellants, this court grants Appellants' request to strike any reference to the Jacobson testimony. [4] In doing so we observe that it is a fundamental and elementary proposition that counsel is obligated to present an accurate record on appeal.

III.

In their first point, Appellants argue that it is the "Commission's constitutional obligation, not this [c]ourt's burden, to offer evidence that justifies a plan that contains deviations in excess of 10%, that favor pre-existing [c]ounty [c]ouncil districts and that 'fractures' the judicial district of Puna."[5] (Emphasis in original.) Appellants maintain that this court "overlook[ed] . . . that officials in Riley[v. Baxter County Election Commission, 843 S.W.2d 831 (Ark. 1992),] actually testified to the court to explain their reason for offering a plan that contained deviations in excess of 10% [and that] . . . [n]either the trial court nor the appellate court in Riley searched through the record to fathom the basis for official action."

To the contrary, this court did not "overlook" the fact that the commission member in Riley "actually testified" inasmuch as the opinion expressly states that "[a]t the hearing before the trial court, a commission member testified that 'the overriding principle' followed by the commission in redistricting 'was equal representation.'" Slip op. at 21 (quoting Riley, 843 S.W.2d at 833) (emphasis added). The rule extrapolated from Riley was that a redistricting plan survives equal protection scrutiny where its variation is "only slightly over the acceptable 10% variation[,]" and "the commission's 'systematic approach . . . reveal[s] a rational policy of redistricting.'" Id. (quoting Riley, 843 S.W.2d at 833) (emphasis added).

The opinion agrees with Appellants that "the Commission did not address the deviation question because it was working from the 'total' as opposed to 'resident' population base, which presented only an 8.62% deviation." Id. at 22. But, it was decided that similar to Riley, "the 10.89% total deviation of the Commission's plan is 'only slightly over the acceptable 10% variation[,]" id. at 21, and "akin to the approach exemplified by the commission member's

testimony in Riley, the Commission in the instant case, by using a 'total' population, evidenced an intent to achieve inclusiveness and equal representation." Id. at 22 (emphasis added).

Even without the Jacobson testimony, which is stricken, Commissioner Mark Van Pernis's "motion to 'include all people,'" which was "put to a vote and carried, evidenc[ed] that the Commission was motivated by inclusiveness, as opposed to a discriminatory purpose." Id. Moreover, the opinion cites to three additional criteria for redistricting as mandated by section 3-17(f) of the Charter of the County of Hawai'i (the Charter). See id. at 23. As the opinion notes, "Appellants [did] not contend that the Commission failed to consider [these] other redistricting criteria under the Charter or that such criteria would not support a slightly greater deviation than the 10% prima facie threshold." Id.

Additionally, County Appellees, in their memorandum in opposition to the motion for reconsideration, now identify parts of the record as evidence that the Commission was guided by these other Charter-mandated criteria. First, the reapportionment plan itself reflects the Commission's consideration of the "permanent and easily recognizable features" criterion, Charter § 3-17(f)(3), inasmuch as the written descriptions of each of the designated council districts refer to streams, shorelines, and other geographical features.

Second, at their final meeting on December 18, 2001, the commissioners made statements that evidence serious consideration of all four criteria. One commissioner related the Commission's task of balancing the equal representation criterion with the other three criteria:

> Since the Big Island population is not equally spread out geographically throughout the Island, obviously the districts cannot be geographically equal in size, in addition to being numerically equal. That is why

argument and controversy can result. Some people or groups want a council district which serves their interest in a particular geographical area or a plan which serves their particular or geographical or political interest. But these localized special interests don't give adequate consideration to the rest of the Island.

The Commission needs to consider all of the Island and all of its people in making the best plan. Such plans would spread around more fairly the benefits and detriments of equal numbers but on equal geography.

Another commissioner expressed the Commission's motivation to adopt a plan ensuring that, consistent with the provisions of Charter sections 3-17(f)(1) and (2), "[n]o district shall be drawn to unduly favor or penalize a person or political faction" and that districts would be "contiguous and compact":

I have no doubt in my mind that we did the very best we could with creating, you know, as compact and as contiguous districts as possible. . . .

So we did as a Charter mandate, we did the very best we could wherever possible to create a [sic] compact and contiguous districts as we could. We made concerted efforts to keep communities and subdivisions together. Again, here and there, there [sic] wasn't absolutely do-able because of the census tracts and numbers and all the other issues. But I have no doubt in my mind that we did our very, very best.

. . . .

I have no doubt in my mind that no specific group was penalized, and no specific group was favored, we did the very best we could, all of the Island and all the communities.

Pursuant to Riley, these statements, made by the Commission members themselves, justify the slightly greater than 10% deviation.[6] Accordingly, this court did not "overlook" or "misapprehend" the Riley holding.[7]

IV.

In their third point, Appellants argue that while the Commission's reliance on the total population base "reflects the underlying principle of the one man - one vote doctrine, it does not describe a rational state policy" inasmuch as it "allows an apportioning body to create legislative districts under which pre-existing districts (and the incumbents therein) are favored and [to] 'fracture' well-known communities of interests because of administrative convenience[.]"[8]

Appellants' motion attempts to clarify what was obviously ambiguous in their appellate briefs -- the possibly problematic effect of the redistricting plan on "communities of interest."[9] According to the motion, the redistricting plan allegedly "fractures" the "judicial" district of Puna:

> [T]he judicial district of Puna with 31,307 countable people is "fractured" by assigning portions of "upper" Puna along with portions of the adjoining judicial district of South Hilo to County Council District #3 and by assigning other portions of "upper" Puna along with all of the adjoining judicial district of Ka'u and portions of the non-adjoining, distant judicial district of South Kona to County Council District #6. As a result, residents of Puna have one resident councilor and must "share" two councilors with other adjoining districts who may or may not be a resident of Puna. This is a classic example of vote dilution of residents of one district in favor of residents of other districts.
>
> As a result, residents of the "upper" Puna, whose population may justify a single councilor of its own,

> find their interests submerged into the adjoining and distant judicial districts of South Hilo, Ka'u, and South Kona. More significantly, Council Districts #1, 2, 3, and 4 are denominated by "Hilo interests," with a statistically significant number of non-resident students (who should have been excluded) in the judicial district of South Hilo.

While this explanation may have raised a concern, Appellants withdrew these arguments in the January 6, 2003 stipulation to amend first amended complaint and for entry of judgment. The stipulation stated:

> Plaintiffs and Defendants herein stipulate to the amendment of the First Amended Complaint filed here on March 6, 2002 as follows:
>
> 1. Plaintiffs withdraw and delete Paragraphs 12.a to 12.f;
>
> 2. Plaintiffs withdraw and delete Paragraphs 12.j to 12.n.
>
> The effect of the deletions is to withdraw Plaintiffs' allegations that the County of Hawai'i 2001 Reapportionment Commission failed to use a "rational or objective methodology" (¶¶ 12.a to 12.f) and wrongfully submerged communities of interest into larger districts (¶¶ 12.j to 12.n) but not Plaintiffs' allegations as to the population base that the County of Hawai'i 2001 Reapportionment Commission used (¶¶ 12.g to 12.i and 12.o to 12.p).
>
> As a result, the Order for Summary Judgment entered herein on the population base that the County of Hawai'i 2001 Reapportionment Commission used disposes of all issues herein leaving no other issues left for decision.

Specifically, the stipulation withdrew, inter alia, the following allegations:

No Rational or Objective Methodology

12.e. When the public provided information and recommendations on the assignment of communities of interest to specific Council Districts that differed from the 1991 Council District boundaries and the Commission's fixed geographical "starting points," the Commission rejected the public's input and recommendations, continued to rely upon the existing 1991 Council District boundaries and its arbitrar[il]y fixed geographical "starting points" and justified its adoption of the 2001 Reapportionment Plan by using arbitrary and inconsistent criteria.

> 12.f. As a consequence, the Commission's 2001 Reapportionment Plan (1) keeps incumbents in Council Districts based on the 1991 Council District boundaries, despite changes in the population for the County of Hawai'i since 1991, (2) fractures existing communities of interest, and (3) dilutes the representative power of some communities of interest while inflating the representative power of other communities of interest.
>
> . . . .

Submergence of Communities of Interests into Larger Districts Where Different Socio-Economic Interests Predominate

> 12.j. For more than 100 years, governmental units in Hawai'i have used the traditional land districts of the Island of Hawai'i, now known as the judicial districts, to organize government agencies and to administer government programs. . . .
>
> 12.k. These traditional land districts, or judicial districts, are the Districts of North Hilo, South Hilo, Puna, Ka'u, South Kona, North Kona, South Kohala, North Kohala and Hamakuà[.]

12.l. Furthermore, distinct communities of interest have developed and exist within these traditional land districts, or judicial districts.

12.m. Although the reapportionment principles in Articl IV, Section 6 of the Hawai'i State Constitution state that a reapportioning body shall avoid "[w]here practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate," the Commission did not identify or consider the socio-economic interests of communities that could be determined from public sources available to the Commission on subjects such as education, employment and poverty levels, or the effect of including communities of differing socio-economic interest into designated Council Districts.

12.n. As a consequence, even though reasonable and practicable alternatives existed and even though the public had provided the Commission with background information on the differing socio-economic interest of communities, the Commission rejected such alternatives and information and, using its arbitrary geographical "starting points" and 1991 Council District boundaries, submerged communities of interest in certain areas into a larger district wherein substantially different socio-economic interest predominate. This consequence is reflected in the Commission's action that:

> (1) divided communities in the upper (or northern) portion of the Puna judicial district and assigned those divided communities to two (2) separate Council Districts where substantially different socio-economic interest predominate[.]

(Some emphases added and some in original.) As observed in the opinion, "[t]he effect of the parties' stipulation . . . was

'to withdraw Appellants' allegations that the . . . Commission failed to use a 'rational or objective methodology' . . . and wrongfully submerged communities of interest into larger districts but not Appellants' allegations as to the population base that the . . . Commission used." Slip op. at 5 n.3 (brackets omitted) (emphasis added).

Appellants' withdrawal of the argument that the redistricting plan submerges communities of interests into larger districts where different socio-economic interests predominate precludes a resurrection of that argument on appeal, especially on a motion for reconsideration. See Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 27 (1992) ("The purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion."); Briggs v. Hotel Corp., 73 Haw. 276, 287 n.7, 831 P.2d 1335, 1342 n.7 (1992) ("We again remind litigants that a motion for reconsideration is not the time to relitigate old matters."). Hence the alleged "vote dilution" of Puna residents is not properly before this court, having been withdrawn by stipulation. This court, then, did not "overlook" the "fracturing" of the judicial district of Puna because it was not a part of the appeal.

As to Appellants' contention that "the only articulated reason found in the County Reapportionment Commission's records" was "administrative convenience," as discussed supra, it must be reiterated that (1) Commissioner Van Pernis's "motion to 'include all people,'" which was "put to a vote and carried, evidenc[ed] that the Commission was motivated by inclusiveness as opposed to a discriminatory purpose[,]" slip op. at 22, and (2) the opinion cites to three additional criteria for redistricting mandated by section 3-17(f) of the Charter required to be considered by the Commission. See id. at 23. Moreover, the "administrative

convenience" argument was not presented as a discernible legal argument in Appellants' briefs[10] and, hence, need not have been addressed. Norton v. Admin. Dir. of the Court, 80 Hawai`i 197, 200, 908 P.2d 545, 548 (1995) (disregarding a particular contention for lack of a "discernible argument in support of that position, in violation of Rule 28(b)(7) of the Hawai`i Rules of Appellate Procedure").

V.

In their fourth point, Appellants disagree with this court's statement that "Appellants do not argue, nor point to evidence in the record, that the Commission did not 'make an honest and good faith effort to construct districts . . . of equal population as is practicable[.]'" Slip op. at 24 (citation omitted). Appellants assert in the motion that the lack of good faith and honesty argument was "subsumed" in their assignment of error and incorrectly assert that they "argued in their Opening Brief[11] . . . [that the Commission] made no effort, even when informed of the risks that it was taking by using the wrong population base, [sic] the Commission proceeded anyway - because of administrative convenience, because it was too difficult and time-consuming to do otherwise."

The fact remains, however, that Appellants did not expressly make a "lack of good faith and honesty" argument. Moreover, even if this court were to accept Appellants' contention that such an argument was "subsumed" in its assignment of error, it would not alter this court's conclusion that "[w]hat remains is Appellants' conclusory statement that the 'Commission's records do not reflect any evidence that justifies the [C]ommission's action to adopt a [r]edistricting [p]lan that has deviations that exceed the ideal mean by more than 10%.'" Slip op. at 24. Indeed, as County Appellees observe, the Commission's inclusion of the deviation charts in the reapportionment plan is "indicative of the good faith effort of the Commission to

achieve equal representation by keeping the deviations at no more than five percent." (12) Hence, this point is without merit.

VI.

In their fifth argument, Appellants maintain that "[a]lthough this Court states that [Appellants] did not assert that the County Reapportionment Commission's plan is invalid, if the plan is constitutionally defective, the plan cannot be valid." But the opinion, in addition to pointing out that Appellants did not argue that the use of the wrong population base alone invalidated the Commission's plan, also observed that "[e]ven if Appellants had argued that the plan was void for being based on the wrong population, . . . the language of Charter section 3-17(f)(4) would bring us back to the constitutional question." Slip op. at 15. Accordingly, the opinion proceeds to address the question of whether, "when nonresident military personnel, their dependents, and university students are excluded from the population base, 'deviations emerge in the [r]edestricting [p]lan that exceed constitutional limits.'" Id. Thus, the opinion is in agreement with Appellants' contention that if the plan was constitutionally defective, it would be invalid. A majority of this court did "not believe that that [was] the case, however." Id. Such matters, then, were not "overlooked" or "misapprehended."

VII.

Finally, Appellants argue that "[i]n the usual case, this Court would remand the case to the trial court for further proceedings[,]" but because "the trial judge is no longer sitting and the County Reapportionment Commission has been dissolved[,] . . . this Court should simply reverse the trial court's judgment below[, and u]pon such reversal, the parties may then apply to this Court for further relief as the circumstances may warrant." In light of the disposition

herein, these matters need not be addressed, and in any event, appear irrelevant to the decision.

VIII.

Therefore, based on the foregoing,

IT IS HEREBY ORDERED that the motion for reconsideration is granted as to the request to strike the reference to the Jacobson testimony, and, therefore, the paragraph beginning on line 12 from the top of page 22 of the opinion shall be amended by striking the words after "Commission" on line 12 through line 20 and striking the word "then" on line 21, leaving the sentence beginning on line 12 to read:

For at the second meeting of the Commission, Commissioner Mark Van Pernis made a motion to "include all people": "[A]ll the people that the census counted is included because, whether they vote or not, or whether they're young or old, military or not, they all use county services, they all pay taxes in some form or shape and they all need representations."

The Clerk of the Court is directed to incorporate the foregoing changes in the original opinion and take all necessary steps to notify the publishing agencies of these changes.

IT IS FURTHER ORDERED that the motion is denied in all other respects.

Michael J. Matsukawa, on the motion for plaintiffs-appellants.

Patricia K. O'Toole,
Deputy Corporation Counsel, County of Hawai`i, for defendants-appellees.

1. Hawai`i Rules of Appellate Procedure Rule 40(b) (2005) provides that a motion for reconsideration "shall state with particularity the points of law or fact that the moving party

contends the court has overlooked or misapprehended, together with a brief argument on the points raised."

2. Appellants attach Jacobson's June 22, 2001 testimony to their motion as Appendix 31, but the testimony is already part of the record.

3. County Appellees attached excerpts from the December 18, 2001 transcripts to their memorandum in opposition to Appellants' motion for change of venue, but Jacobson's testimony on pages 9-13 was not included.

4. In their response to the motion, County Appellees maintain that Jacobson's testimony "was given at an earlier meeting of the Commission before any particular plan was before it. She later spoke in support of a particular plan but did not specifically address the population issue. What she was clearly recanting was the plan she herself submitted to the Commission to consider." To remove any doubt regarding this matter, however, we believe the better course is to excise such testimony.

5. The argument that the redistricting plan "fractures" the judicial district of Puna is addressed infra, Part IV.

6. Hence, as County Appellees maintain, "it would be a futile exercise to remand to ask commissioners for a reason which they have already expressed in the vote on the motion at the June 22, 2001 meeting."

7. Inasmuch as the reapportionment plan and the commissioners' testimony are part of the record, this court may rely on these grounds to affirm the court's judgment. See Delos Reyes v. Kuboyama, 76 Hawai`i 137, 140, 870 P.2d 1281, 1284 (1994) ("This court may affirm a grant of summary judgment on any ground appearing in the record, even if the circuit court did not rely on it.").

8. Appellants argue as follows:

> In offering its justification for the County Reapportionment Commission's plan (in

substitution of the Commission's omission), this Court states that the Commission's purpose must have been to use a total population base that would give every man, woman, child, incarcerated felon, soldier, dependent of a soldier, resident alien and others "representation."

While this statement reflects the underlying principle of the one man - one vote doctrine, it does not describe a rational state policy. Nor does it explain how that state policy is in fact legitimately advanced by a plan that is prima facie unconstitutional because it violates that one man - one vote doctrine of keeping populations as equal as possible to avoid the danger of diluting votes.

The extension of this statement is that the one man - one vote principle allows an apportioning body to create legislative districts under which pre-existing districts (and the incumbents therein) are favored and that "fracture" well-known communities of interests because of administrative convenience, the only articulated reason found in the County Reapportionment Commission's records. No court has ever subscribed to such a conclusion.

It should be noted that the opinion did not reference "every man, woman, child, incarcerated felon, soldier, dependent of a soldier, resident alien and others," as Appellants imply in the quote above. The opinion did not employ such a list. Indeed, Appellants stated as a point of error that "the 2001 County Reapportionment Commission should have used a population base that excluded nonresident military personnel and their dependents and nonresident students," groups which the opinion did discuss.

9. Appellants contend that "Table Two, reproduced in Opening Brief, Appendix 25, shows how the judicial district of Puna with 31,307 countable people is 'fractured.'" But Table Two, without explanation, does not convey the specific contention that Puna was "fractured." In fact, Appellants did not utilize Table Two for this proposition. Appellants referenced Table Two on three occasions in their opening brief. The first and second references, stating that "[t]he consequence of not excluding these persons from the population base is set forth in Table One and Table Two," and that "[t]he statistical significance of the 810 nonresidents who are located in the District of South Hilo is shown in Table Two," were cryptic at best. In the third reference, Appellants utilized Table Two to "show[] the number of persons who fall below or above the ideal mean for each council district," not to point out that Puna was being "fractured."

10. At the end of their reply brief, Appellants stated that "[c]onvenience, not substantive law, dictated the outcome of the final Redistricting Plan." This statement did not establish that the Commission was guided by administrative convenience in creating legislative districts. Again, Appellants did not assert that the Commission failed to consider the other valid criteria as mandated under the Charter. As the opinion observes, "related objections were apparently waived when Appellants stipulated to withdraw the claims that the Commission failed to use a 'rational or objective methodology' and 'wrongfully submerged communities of interest into larger districts,' . . . thereby abandoning any claim that the Commission incorrectly applied the other three criteria in Charter section 3-17(f)." Slip op. at 23-24.

11. The term "convenience" first appeared in the reply brief, not the opening brief as Appellants state, and it does not appear Appellants used the term "administrative convenience." See supra note 10.

12. Using the total population base, the deviation percentage of each district does not exceed 5% and, therefore, does not exceed the 10% threshold.

FOR PUBLICATION

DISSENTING OPINION BY NAKAYAMA, J., IN WHICH MOON, C.J., JOINS

I write to emphasize that, in contrast to the majority's opinion, Riley v. Baxter County Election Commission, 843 S.W.2d 831 (Ark. 1992), in no way supports the conclusion that the 2001 County of Hawai'i Reapportionment Commission (Commission) followed a "rational" redistricting policy that justifies what is otherwise an unconstitutional redistricting plan.

Riley is clearly distinguishable. At issue in that case was a county redistricting plan drawn by the election commission of Baxter County, Arkansas. Having relied on an accurate population count, the commission was aware that its plan, which exhibited a total population deviation of 10.149 percent, was presumptively unconstitutional. Id. at 832.

When the plan's constitutionality was subsequently challenged, commission members stepped forward to justify the heightened population deviation. Testimony from those members indicated that, while endorsing the "overriding principle . . . [of] equal representation," the commission also believed that the plan should "keep to the old district lines as much as possible to avoid inconveniencing the voters." Id. at 833. The rational policy of "voter convenience," proffered by the commission in formal testimony, thus justified the plan's incremental erosion of equal representation. Id.

Riley accordingly stands for the far from novel proposition that, where a redistricting plan's total population deviation exceeds 10 percent, the redistricting authority must step forward and articulate some rational justification for the deviation. See Voinovich v. Quilter, 507 U.S. 146, 161 (1993). Riley does not address the far different factual situation at issue here, where a redistricting authority, in mistaken reliance on an inaccurate population count, formulates a redistricting plan that was never intended to be presumptively unconstitutional. Neither Riley, nor for that matter, any of the other cases cited by the majority, endorses the majority's contention that a presumptively unconstitutional redistricting plan may be "rationalized" when the redistricting authority, due to an unrealized computational error, inadvertently devises a plan that exhibits a total population deviation in excess of 10 percent.

The dearth of authority supporting that contention is unsurprising. The fourteenth amendment to the United States Constitution generally requires that a reapportionment plan's total population deviation be less than 10 percent to pass constitutional muster. Brown v. Thomson, 462 U.S. 835, 842-843 (1983). Nonetheless, because "[m]athematical exactness or precision is hardly a workable constitutional requirement," Reynolds v. Sims, 377 U.S. 533, 577 (1964), the fourteenth amendment tolerates a limited degree of divergence "from a strict population standard," provided that the plan as a whole is "based on legitimate considerations incident to the effectuation of a rational state policy." Id. at 579. In other words, countervailing state interests may, at times, permit a less than numerically equal redistricting plan, and a reapportionment authority is not necessarily remiss in pursuing those interests at the expense of perfect numerical equality among the voting districts.

The foregoing framework for assessing the constitutionality of a redistricting plan pragmatically acknowledges that

government must, in certain circumstances, be allowed to pursue redistricting policies that incidentally enhance the representational power of some members of the electorate at the expense of others. It was never intended to function as a curative device for excusing, after the fact, a reapportionment authority's gross computational errors or inadvertent methodological mistakes -- especially where, as here, those missteps were solely responsible for tainting the redistricting plan with the presumption of unconstitutionality.

The right of equal representation is far too hard-won a liberty for its erosion to be justified so blithely. Accordingly, I must dissent.

A 22

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai`i nonprofit corporation; BRENDA J. FORD; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST; RONALD C. PHILLIPS, Plaintiffs-Appellants

and

BEVERLY BYOUK and SANDRA W. SCARR, Plaintiffs-Appellees

vs.

COUNTY OF HAWAI`I; COUNTY CLERK, COUNTY OF HAWAI`I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI`I 2001 REAPPORTIONMENT COMMISSION, Defendants-Appellees

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NO. 25614

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 02-1-0092)

ORDER OF CORRECTION
(By: Acoba, J.)

Upon review of the opinion of the court filed in this case on July 22, 2005, it appears that the civil number reflected on

page 1 of the opinion, Civ. No. 01-1-0092, is incorrect. Therefore,

IT IS HEREBY ORDERED that the civil number is corrected to read: Civ. No. 02-1-0092.

IT IS FURTHER ORDERED that the clerk of the court is directed to incorporate the foregoing change in the original opinion and take all necessary steps to notify the publishing agencies of this change.

DATED: Honolulu, Hawai`i, July 28, 2005.

A 24
*****FOR PUBLICATION*****

IN THE SUPREME COURT
OF THE STATE OF HAWAI`I

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CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT,
a Hawai`i nonprofit corporation; BRENDA J. FORD; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST;
RONALD C. PHILLIPS, Plaintiffs-Appellants

and

BEVERLY BYOUK and SANDRA W. SCARR,
Plaintiffs-Appellees

vs.

COUNTY OF HAWAI`I; COUNTY CLERK, COUNTY OF HAWAI'I; LLOYD
VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI`I 2001 REAPPORTIONMENT COMMISSION, Defendants-Appellees

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NO. 25614

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 01-1-0092)

JULY 22, 2005

LEVINSON, ACOBA, AND DUFFY, JJ.;
WITH NAKAYAMA, J., CONCURRING SEPARATELY AND
DISSENTING, WITH WHOM MOON, C.J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold that (1) the phrase "equal resident populations" in section 3-17(f)(4) of the Charter of the County of Hawai`i (the Charter) excludes nonresident college students and nonresident military personnel and their dependents from the population base for purposes of reapportioning county council districts of the County of Hawai`i, (2) a total deviation in excess of 10% in an electoral reapportionment plan presents a prima facie case of discrimination in violation of the equal protection clause of the United States Constitution, (3) a rational government policy will justify a total deviation that slightly exceeds the 10% threshold, and (4) assuming, in excluding nonresident students and nonresident military personnel and their dependents from the population base, the plan of the County of Hawai`i 2001 Reapportionment Commission (the Commission) resulted in a total deviation of 10.89%, such a deviation in this unique instance (a) was minimal, (b) apparently included the Commission's consideration of other valid criteria under section 3-17 of the Charter, (c) resulted from the commission's intent to achieve inclusiveness and equal representation, and (d) was, therefore, constitutional.

I.

Pursuant to the Charter, Defendant-Appellee County of Hawai`i initiated a reapportionment of its county council districts in 2001. The Commission was appointed and confirmed in accordance with a provision in the Charter requiring that in 1991, and every tenth year thereafter, a commission be established to determine the boundaries of council districts, and to file a reapportionment plan by December 31 of those years.[1] A series of public meetings and hearings was held throughout Hawai`i County, during which private speakers argued that the Commission was using the wrong population base and should exclude there

from nonresident college students and nonresident military personnel and their dependents. The Commission adopted a reapportionment plan (the Commission's plan) and filed it as required with the County Clerk. The Commission's plan provided for a total resident population base that included nonresident college students and nonresident military personnel and their dependents.

Subsequent to the filing of the Commission's plan, Plaintiffs-Appellants Citizens for Equitable and Responsible Government, Brenda J. Ford, Stanley A. Boren, Floyd H. Lundquist, Marlene E. Lundquist, Ronald C. Phillips, (collectively, Appellants) and Plaintiffs-Appellees Beverly Byouk and Sandra W. Scarr filed a Complaint and First Amended Complaint against County of Hawai`i and other Defendants-Appellees, the County Clerk, Hawai`i County and Llyod Van De Car, Chairman of the Commission (collectively, County Appellees) in the third circuit court (the court) [2] requesting, inter alia, a declaratory ruling that the Commission's plan was invalid.

Appellants moved for partial summary judgment on the ground the Commission used the wrong population base and that, therefore, the Commission's plan was unconstitutional because its total deviation from the ideal mean exceeded 10%. Appellants appended to their motion for summary judgment a letter dated October 25, 1989, written by Christopher J. Yuen (Yuen), the attorney representing the Commission during the drafting of the reapportionment plan, for the proposition that the Commission was advised to use the same population base as used by the State Reapportionment Commission. On June 20, 2002, County Appellees filed an affidavit by Yuen to rebut Appellants' proposition. Appellants moved to strike the affidavit.

Following a hearing, the court denied Appellants' motion and sua sponte granted partial summary judgment in favor

of County Appellees. The court did not issue findings of fact or conclusions of law, but in its July 19, 2002 order stated, inter alia, as follows:

> The [c]ourt finds that the adoption by the . . . Commission of a resident population base which did not exclude non-resident military personnel and their dependents and did not exclude non-resident university students in the 2001 council redistricting plan was proper.
>
> The [c]ourt also finds that there was no unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan adopted by the . . . Commission.

Following the court's ruling, the parties agreed to withdraw all remaining counts so that final judgment could be entered in the case.[3] The court entered final judgment in favor of County Appellees and against Appellants on January 24, 2003. Appellants filed their notice of appeal on January 31, 2003.

II.

On appeal, Appellants maintain that the court erred in (1) refusing to strike the affidavit of the Commission's counsel, (2) concluding that the Commission could include nonresident university students and nonresident military personnel and their dependents in the population base, (3) deciding that the total deviation between county council districts in the redistricting plan did not exceed constitutional limits, and (4) ruling that the redistricting plan is valid. They request an order (1) invalidating the Commission's plan, (2) appointing a master to prepare a new redistricting plan using the correct population base, and (3) granting such other appropriate relief.

III.

"Unlike other appellate matters, in reviewing summary judgment decisions[,] an appellate court steps into the shoes of the trial court and applies the same legal standard as the trial court applied. Beamer v. Nishiki, 66 Haw. 572, 577, 670 P.2d 1264, 1270 (1983). "Summary judgment is appropriate if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Pac. Int'l Serv. Corp. v. Hurip, 76 Hawai`i 209, 213, 873 P.2d 88, 92 (1994). A trial court's conclusions of law are reviewed de novo under the right/wrong standard. Fujimoto v. Au, 95 Hawai`i 116, 137, 19 P.3d 669, 720 (2001). Under this standard, the trial court's conclusions of law are not binding upon the appellate court and are freely reviewable for its correctness. Id.

IV.

As to point (1), the court did not rule on Appellants' request to strike an affidavit of the Commission's attorney. Appellants assert that the affidavit of the Commission's attorney is not part of the Commission's records and contains the opinion and recollection of the attorney ten years after-the-fact. County Appellees maintain that they offered the affidavit of the Commission's attorney to clarify that the letter in Appellants' motion stated only that there was a difference in reapportionment between using residents, as opposed to registered voters, in determining the population base and that the affidavit was not introduced to reflect the intent of the charter commission.[4] Inasmuch as the affidavit was not offered with respect to the intent of the charter commission and is not necessary to our interpretation of the phrase "resident populations," see infra, we do not address Appellants' point (1)..

V.

The primary issue on appeal, Appellants' point (2), is whether nonresident college students and nonresident military personnel and their dependents should be excluded from the population base of Hawai`i County's reapportionment of city council districts. The Charter mandates that "[d]istricts shall have approximately equal resident populations as required by applicable constitutional provisions[,]" Charter § 3-17(f)(4) (emphasis added), see supra note 1, but fails to define the phrase "resident populations."

Appellants first argue that "resident populations" should be interpreted in the same manner as that term is applied in the apportionment of state representative districts, that is, by using a permanent resident population base. Appellants refer to an amendment made to Article IV of the Constitution of the State of Hawai`i in 1992, when voters statewide voted to use a "permanent resident" population base for apportioning legislative districts. The amendment mandated that only residents having their domiciliary in the State of Hawai`i may be counted in the population base for the purpose of reapportioning legislative districts. Article IV of the Constitution of the State of Hawai`i states in relevant part as follows:

> The commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units namely: (1) the island of Hawai'i, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (2) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, using the total number of permanent residents in each of the basic island units and computed by the method known as the method of equal proportions; except

> that no basic island unit shall receive less than one member in each house.

Haw. Const. art. IV, § 4 (amended 1992) (emphasis added). However, the amendment to Article IV only applies to state legislative redistricting, not county council redistricting.

The Commission interpreted the Charter phrase "resident populations" to encompass all persons who "reside within the county" as reflected in the federal census and, accordingly, did not exclude nonresident university students and nonresident military personnel and their dependents in the population base for the reapportionment plans. County Appellees argue that the Commission's interpretation of the phrase was a discretionary act, and, thus, under Kawamoto v. Okata, 75 Haw. 463, 868 P.2d 1183 (1994), the actions of the Commission should be accepted unless an abuse of discretion is shown.

"The interpretation of the charter is similar to the interpretation of a statute." Maui County Council v. Thompson, 84 Hawai`i 105, 106, 929 P.2d 1355, 1356 (1996). When interpreting a statute,

> our foremost obligation is to ascertain and give effect to the intention of the legislature[,] which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.

Id. (quoting State v. Baron, 80 Hawai`i 107, 113, 905 P.2d 613, 619 (1995) (emphasis added). In this regard, a common definition of "resident" is

> [a]ny person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his

> presence within the State is something other than merely transitory in nature.

Black's Law Dictionary 1309 (6th ed. 1990) (emphases added). See In re Irving, 13 Haw. 22, 24 (1900) ("[T]he primary significance of the word 'residence' as used in the constitution is the same as domicil[e] -- a word which means the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights." (Quoting Chase v. Miller, 41 Pa. 403, 420 (Pa. 1862))). This definition of "resident" would exclude any person who did not exhibit a present intent to remain within Hawai`i County for more than a transitory period.

Generally, college students from outside Hawai`i County who lack a present intent to remain in the county for a period of time beyond their date of graduation would not be considered residents. Their presence in Hawai`i County is primarily for educational purposes, which is "transitory in nature." Likewise, ordinarily the transitory nature of military personnel from outside Hawai'i County is apparent. Normally, military personnel and their dependents are temporarily stationed in the county by the United States military. Military personnel may have little say in deciding the location of their assignment. As a result, generally speaking, members of the military are in Hawai`i County involuntarily, as opposed to persons who choose to live in the county. See Carpenter v. Hammond, 667 P.2d 1204, 1211 (Alaska 1983) (recognizing the "involuntary nature of the military member's assignment to [a] state").

The Charter employs the phrase "resident populations" which indicates that the drafters of the Charter intended to limit the population base to residents of Hawai`i County. Those who live in the county temporarily for educational purposes or those who live in the county involuntarily because ordered to do so would seemingly lack a present intent to remain in the county, rendering their stay

"transitory in nature."[5] Logically, the drafters of the Charter would not have modified the word "population" by the adjective "resident" or, on the other hand, would have employed the phrase "total population" had they intended to include nonresident college students and nonresident military personnel and their dependents in the population base.

Accordingly, we hold that the phrase "resident populations" found in the Charter excludes nonresident university students and nonresident military personnel and their dependents from the population base of the county council reapportionment plan. The court, therefore, was wrong to conclude that the Commission's inclusion of these nonresidents was proper.[6]

VI.

While we must interpret the term "resident populations," we note that no dispute is raised by the parties as to whether the persons designated as residents or nonresidents were properly denominated as such. Appellants note that "in 2001, State officials had access to an improved database and software program and had the ability to collect data that enabled state officials to identify and locate nonresident students, nonresident military personnel and nonresident military dependents with reasonable accuracy." (Emphases omitted.) Thus, argue Appellants, "[i]t was also possible to identify these same individuals for the purpose of establishing county council seats for the County of Hawai`i County Council."

County Appellees do not deny the availability of such technology nor challenge its feasibility. In fact, they apparently relied on the State's database and computer program to support their motion for partial summary judgment. In an affidavit attached as "Exhibit D" to County Appellees' motion for partial summary judgment, David J. Rosenbrock, data processing coordinator for the State of

Hawai`i Office of Elections, stated that "his office provided population data to the County of Hawai`i Reapportionment Commission," derived from "the federal census, the United States Military and from the University of Hawai`i at Hilo." Attached as "Exhibit 1" to the affidavit were three charts showing (1) total population with no extractions, (2) total population with nonresident students and nonresident military personnel extracted, and (3) total population with nonresident students, nonresident military personnel and their dependents extracted. The third chart expressed a deviation of 10.893%. The difference in population bases between the first chart, showing a total population of 148,677, and the third chart, showing a total population minus nonresidents of 147,806, confirms Appellants' calculation in their opening brief that using information from the Commission's computer database, 871 "nonresidents . . . should have been excluded from the population base." County Appellees do not raise any objection to this.

VII.

We observe further that the exclusion of identifiable nonresidents from the population base is consistent with the rules for determining "residency" for election purposes under Hawai'i's state election law, Hawai`i Revised Statutes (HRS) chapter 11. HRS chapter 11 governs "all elections, primary, special primary, general, special general, special, or county." HRS § 11-3 (1993) (emphasis added). Pursuant to HRS § 11-11 (1993), the "county clerk shall be responsible for voter registration in the respective counties and the keeping of the general register and precinct lists within the county." HRS § 11-13 (1993) provides seven rules for determining a person's "residency" for voter registration purposes. The statute references students as well as military personnel as follows:

> (5) A person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison;
>
> (6) No member of the armed forces of the United States, the member's spouse or the member's dependent is a resident of this State solely by reason of being stationed in this State[.]

HRS § 11-13. The Commission, by relying on "the census-counted population," included persons in the population base "solely by reason of the person's presence" in Hawai`i County "while employed in the service" or "while a student of an institution of learning[.]" This counting of students and military personnel and their dependents based on mere presence alone conflicted with the statutorily mandated process for determining who may register to vote among the counties. The plain reading of "resident populations" avoids the anomalous result of counting nonresidents in the reapportionment plan when those nonresidents, pursuant to HRS § 11-13, cannot register to vote.

VIII.

A.

In line with our holding, the Commission should have excluded the said nonresidents from the redistricting population base. However, Appellants do not argue that the use of the wrong population base alone invalidates the Commission's plan, but, rather, that the use of the wrong population base created an unconstitutional deviation. Even if Appellants had argued that the plan was void for being based on the wrong population, we observe that the language of Charter section 3-17(f)(4) would bring us back to the constitutional question. Section 3-17(f)(4) states that "[d]istricts shall have approximately equal resident

populations as required by applicable constitutional provisions." (Emphases added.) Thus, assuming Appellants' calculations, infra, are correct, we address Appellants' argument in points (3) and (4) that when nonresident military personnel, their dependents, and university students are excluded from the population base, "deviations emerge in the [r]edistricting [p]lan that exceed constitutional limits." We do not believe that that is the case, however.

B.

The United States Supreme Court has held that the equal protection clause of the United States Constitution requires that electoral representation "be apportioned on a population basis." Reynolds v. Sims, 377 U.S. 533, 568 (1964). [7] This requirement means "that a [s]tate [must] make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." Kawamoto, 75 Haw. at 470, 868 P.2d at 1187 (quoting Reynolds, 377 U.S. at 577 (emphases added)). The Court recognized, however, that "[m]athematical exactness or precision is hardly a workable constitutional requirement." Reynolds, 377 U.S. at 533. See Kawamoto, 75 Haw. at 474, 868 P.2d at 1189. Accordingly, it adopted a flexible, "case-by-case" approach to assessing redistricting plans, providing "general considerations" as follows:

> A [s]tate may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designating a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one [s]tate, while another [s]tate might desire to achieve some

> flexibility by creating multimember or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the [s]tate.
>
> . . . .
>
> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.

Reynolds, 377 U.S. at 578-79 (emphases added). See Swann v. Adams, 385 U.S. 440, 443-44 (1967) (reversing a decision upholding a reapportionment plan where the state failed to present, and the district court failed to articulate, "acceptable reasons for the variations" of 30% among senate districts and 40% among house districts).

The "general principle of population equality . . . applies to state and local elections[.]" Abate v. Mundt, 403 U.S. 182, 185 (1971). The Supreme Court has intimated that "slightly greater percentage deviations may be tolerable for local government apportionment schemes" and that "particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality." Id. See id. at 186-88 (upholding a county reapportionment plan with a total deviation of 11.9% and districts that exactly correspond to the county's five towns "based on the long tradition of overlapping functions and dual personnel" in the county government and "on the fact that the plan . . . [did] not contain a built-in bias tending to favor particular political interests or geographic areas").

> In view of these considerations, . . . minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. [Supreme Court] decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the [s]tate. Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (internal quotation marks and citations omitted). See Kawamoto, 75 Haw. at 474, 868 P.2d at 1189.

At issue in Brown was a Wyoming reapportionment plan that allocated one of sixty-four seats in the state's house of representatives to a county with a deviation of 60% below the mean. Id. at 837, 843. Nevertheless, the Supreme Court upheld the plan on the following bases: (1) it was "undisputed" that Wyoming's policy of ensuring that each county had one representative was "free from any taint of arbitrariness or discrimination"; (2) "population equality [was] the sole other criterion used"; and (3) "there [was] no built-in bias tending to favor particular political interests or geographic areas." Id. at 843-44. The Brown majority approved of the Wyoming plan as "an unusually strong example of an apportionment plan the population variations of which [were] entirely the result of the consistent and nondiscriminatory application of a legitimate state policy." [(8)] Id. at 844. Thus, the "ultimate inquiry" is to determine "whether the legislature's plan may reasonably be said to advance a rational state policy and, if so, whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits."

Id. at 843 (internal quotation marks, brackets, and citation omitted) (emphasis added).

IX.

A.

The Commission's plan divides Hawai`i County into nine districts. Using the "resident population" base (excluding nonresident military personnel, their dependents, and university students) of 147,806, propounded by Appellants, the ideal mean is 16,423 (147,806 divided by nine). According to Appellants' briefs and the record, the difference between the ideal mean and the actual "resident population" of each district represents that district's "deviation," which is translated into a deviation percentage. The difference between the district with the resident population that exceeded the ideal mean by the greatest percentage and the district with the resident population that fell below the ideal mean by the greatest percentage constitutes the redistricting plan's "total deviation." According to Appellants' calculations, the resident population of District 2 was 6.20% below the ideal mean (the latter category) and the resident population of District 8 was 4.69% above the ideal mean (the former category), thereby resulting in a total deviation of 10.89%.[9] County Appellees do not concede that there is such a deviation, maintaining that "[a]ny deviation is the result of the artificial construct of the Appellants in determining that the numbers they believe should have been used are the only correct numbers, when it was clearly within the discretion of the [C]ommission to use the numbers which it did use."[10]

However, as stated supra, to support their motion for partial summary judgment, County Appellees submitted the Rosenbrock affidavit, which arrives at the same 10.89% figure as the total deviation when nonresident students and nonresident military and their dependents are excluded from the total population.

B.

Using Appellants' deviation figure for our analysis, a total deviation of 10.89% exceeds the Supreme Court's threshold and, therefore, creates a prima facie case of discrimination in violation of the equal protection clause. The Supreme Court of Arkansas has addressed a county plan with a total deviation similar to the deviation of the Commission's plan here. In Riley v. Baxter County Election, 843 S.W.2d 831, 832-33 (Ark. 1992), all parties stipulated that the Baxter County redistricting plan varied among the districts by 10.149%. In assessing whether a "rational policy to justify a variance over 10%" existed, id. at 833, the Arkansas Supreme Court acknowledged the "systematic approach" taken by the election commission. The commission had divided "the total population" of Baxter County by eleven, the number of districts to be apportioned.

"The districts with population already closest to that number were kept the same, and the others were slightly modified, taking geography into account, to reach parity." Id. At the hearing before the trial court, a commission member testified that "the overriding principle" followed by the commission in redistricting "was equal representation." Id. The Arkansas Supreme Court concluded that the commission's "systematic approach . . . reveal[ed] a rational policy of redistricting in Baxter County" and that "the 10.149% variance [was] only slightly over the acceptable 10% variation." Id. Thus, it was held that the trial court did not err in finding that the commission overcame the prima facie case of discrimination. Id.

Similarly here, the 10.89% total deviation of the Commission's plan is "only slightly over the acceptable 10% variation." Id. It is true, as Appellants posit, that the Commission did not address the deviation question because it was working from the "total" as opposed to "resident" population base, which h presented only an 8.62%

deviation. However, we cannot say that no rational basis underlay the 10.89% deviation because, akin to the approach exemplified by the commission member's testimony in Riley, the Commission in the instant case, by using "total" population, evidenced an intent to achieve inclusiveness and equal representation. Cf. Calderon v. Los Angeles, 481 P.2d 489, 493 (Cal. 1971) ("Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government." (Emphasis added.)).

For at the second meeting of the Commission, Hawai`i County Councilmember Julie Jacobson testified in favor of "using the population as the basis for the districting," stating that,

> each human being has needs for the government serves [sic] and it doesn't matter if you're one day old, if you're 99 years old, if you vote or don't vote, or any other of those variables . . . each person needs to be considered and I think especially with the complexity of infrastructure issues, that we deal with, that's why it's important.

Commissioner Mark Van Pernis then made a motion to "include all people": "[A]ll the people that the census counted is included because, whether they vote or not, or whether they're young or old, or military or not, they all use county services, they all pay taxes in some form or shape and they all need representations." The motion was put to a vote and carried, evidencing that the Commission was motivated by inclusiveness as opposed to a discriminatory purpose.

Importantly, the Charter required the Commission to consider three additional factors in redistricting. In addition to the "approximately equal resident populations"

requirement at issue here, Charter section 3-17(f) required the Commission to consider the following criteria:

> (1) No district shall be drawn to unduly favor or penalize a person or political faction;
>
> (2) Insofar as possible, districts should be contiguous and compact;
>
> (3) District lines shall, where possible, follow permanent and easily recognizable features; . . . .

These considerations governed the Commission's determination. The statements supra at the second meeting of the Commission evidenced the Commission's commitment against favoring or penalizing a person or political faction in consonance with Charter Section 3-17(f)(1).

Ultimately, the deviation stemming from a "pure population" standard resulted from the Commission's commitment to an inclusive model rather a discriminatory one. Appellants do not contend that the Commission failed to consider other redistricting criteria under the Charter or that such criteria would not support a slightly greater deviation than the 10% prima facie threshold. It should be noted that related objections were apparently waived when Appellants stipulated to withdraw the claims that the Commission failed to use a "rational or objective methodology" and "wrongfully submerged communities of interest into larger districts," see supra note 3, thereby abandoning any claim that the Commission incorrectly applied the other three criteria in Charter section 3-17(f).

Finally, we observe that Appellants do not argue, nor point to evidence in the record, that the Commission did not "make an honest and good faith effort to construct districts . . . of equal population as is practicable[,]" Reynolds, 377 U.S. at 577, that the plan has "'a built-in bias tending to favor particular political interests or geographic areas[,]'" Brown,

462 U.S. at 844 (quoting Abate, 403 U.S. at 187), or that the Commission's redistricting process was "taint[ed]" with "arbitrariness," id. at 843. What remains is Appellants' conclusory statement that the "Commission's records do not reflect any evidence that justifies the [C]ommission's action to adopt a [r]edistricting [p]lan that has deviations that exceed the ideal mean by more than 10%." Therefore, on the foregoing bases and under the specific circumstances of this case, we hold that, ultimately, the court did not err in concluding that "there was no unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan adopted by the . . . Commission "

X.

Based on the foregoing, the Commission's erroneous inclusion of nonresident students and military personnel and their dependents in the population base for reapportionment of Hawai`i County council districts did not ultimately result in an unconstitutional deviation under its reapportionment plan. Although we do not agree with the court that the Commission's population base was correct, we affirm the court's decision upholding the Commission's plan because the plan complies with the mandate of Charter section 3-17(f)(4) that the districts be comprised of "approximately equal resident populations as required by applicable constitutional provisions." (Emphases added.) See Hawai'i Provider's Network, Inc. v. AIG Hawai'i Ins. Co., 105 Hawai`i 362, 368 n.14, 98 P.3d 233, 239 n.14 (2004) ("[W]here the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave the wrong reason for its action." (Quoting Agsalud v. Lee, 66 Haw. 425, 430, 664 P.2d 734, 738 (1983).)); Poe v. Hawai`i Labor Relations Bd., 87 Hawai`i 191, 197, 953 P.2d 569, 575 (1998) ("Where the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling." (Quotation marks and

citation omitted.)). Accordingly, the court's January 24, 2003 final judgment is affirmed.

On the briefs:
Michael J. Matsukawa for
for plaintiffs-appellants.

Patricia K. O'Toole,
Deputy Corporation Counsel,
County of Hawai`i, for
defendants-appellees.

1. Section 3-17 of the Charter under which the Commission acted states as follows:

(a) There shall be a county reapportionment commission which shall establish the boundaries of the council districts.(b) The initial reapportionment commission shall consist of seven members, two of whom shall be residents of the combined judicial districts of North and South Hilo, one from the judicial district of Puna, one from the judicial district of Kau, one from the combined judicial districts of North and South Kona, one from the combined judicial districts of North and South Kohala, and one from the judicial district of Hamakua. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.

> (c) Each subsequent reapportionment commission shall consist of nine members. One member shall be a resident of each council district as established by the previous reapportionment commission. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.

(d) The year 1991 and every tenth year thereafter shall be reapportionment years. The reapportionment commission shall be appointed and confirmed by March 1 of the reapportionment year, and shall file a reapportionment plan with the county clerk by December 31 of the reapportionment year.

(e) The county clerk shall furnish all necessary technical and secretarial services for the reapportionment commission. The council shall appropriate necessary funds to enable the commission to carry out its duties.

(f) The reapportionment commission shall be guided by the following criteria in establishing the boundaries of the council districts:

(1) No district shall be drawn to unduly favor or penalize a person or political faction;

(2) Insofar as possible, districts should be contiguous and compact;

(3) District lines shall, where possible, follow permanent and easily recognizable features;

(4) Districts shall have approximately equal resident populations as required by applicable constitutional provisions.

(g) The district boundaries as established by the reapportionment commission shall be in effect at the first regularly scheduled council election following the filing of the plan and for any subsequent council election. The district boundaries in effect prior to the filing of the reapportionment plan shall remain in effect

> during the duration of the term of all councilmembers elected or appointed to represent such districts until the expiration of the full term of such councilmembers, including any election held to fill an unexpired term under section 3-4.

Charter of the County of Hawai'i § 3-17 (1990)

2. The Honorable Riki May Amano presided.

3. The effect of the parties' stipulation to amend the first amended complaint and for entry of judgment, was "to withdraw [Appellants'] allegations that the . . . Commission failed to use a 'rational or objective methodology'. . . and wrongfully submerged communities of interest into larger districts but not [Appellants'] allegations as to the population base that the . . . Commission used."

4. Yuen's affidavit states that "in drafting the charter language which provides that districts should have 'approximately equal resident populations as required by applicable constitutional provision' the intent was that the degree of equality only be as constitutionally mandated." (Emphasis added.) This reference to the charter commission's "intent" merely confirms what is stated in the criteria in Charter section 3-17(f).

5. Obviously, a person who otherwise ostensibly falls within such categories but establishes a present intent to remain in the county and exhibits indicia that his or her presence is something other than merely transitory may establish resident status. See Black's Law Dictionary at 1309.

6. Inasmuch as we determine the phrase "resident populations" to be plain and unambiguous, we need not examine the 1990 charter commission's records to ascertain the county electors' intent in adopting the phrase. In any event, Appellants maintain that aside from evidence that the charter commission "clearly rejected the use of 'registered

voters' as a base because that provision was already under [legal] attack[,] . . .[t]he rest of the charter commission's records is silent." County Appellees do not cite to the charter commission's records to support the Commission's interpretation. Hence, there is no instructive "legislative" history concerning the term "resident populations."

7. Reynolds is the "seminal decision in defining the 'one man, one vote' doctrine[.]" Calderon v. Los Angeles, 481 P.2d 489, 491 (Cal.1971).

8. The Brown majority noted that the appellants "limited their challenge to the alleged dilution of their voting power resulting from the one representative given to" the subject county and, therefore, the issue was "not whether a 16% average deviation and an 89% maximum deviation . . . [was] constitutionally permissible." 462 U.S. at 846. Hence, the Brown majority believed it was "not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifie[d] the population deviations," id., which is the second prong of the two-part "ultimate inquiry" -- whether the population disparities among the districts exceed constitutional limits. However, Justice Brennan, authoring the dissenting opinion in Brown, in which three justices joined, agreed that "Wyoming's long-standing policy of using counties as the basic units of representation [was] a rational one," but maintained that the deviations in Wyoming's plan, 'even if justified by state policy, [were not] within the constitutionally tolerable range of size." Id. at 853 (Brennan, J., dissenting, joined by White, Marshall, and Blackmun, JJ.).

9. In their opening brief, Appellants list the nine "Land Districts" as "North Hilo, South Hilo, Puna, Kau, South Kona, North Kona, South Kohala, North Kohala, and Hamakua." They calculate the differences between total population and total population less nonresidents as follows: -11 in North Hilo, -810 in South Hilo, -28 in Puna, -6

in Kau, -6 in South Kona, -5 in North Kona, -5 in South Kohala, and no change in North Kohala and Hamakua.

Appellants also contend that "the 'permanent residents' population base for State legislative districts on the island is 147,806 persons . . . and the 'resident populations' base for county council districts on the island is 148,677 . . . , a difference of 871 persons." (Emphases in original.) They argue that "871 is a statistically significant number in this case because most of these individuals reside in a single council district."

In contrast, County Appellees point out the following:

For [D]istrict 8, the .286% above 5% is equivalent to about 47 persons. For [D]istrict 2, the difference of .607% above 5% is equivalent to 100 persons. Thus, even if Appellants' population base were accepted as the only required base, the presumption of constitutionality could be achieved by shifting this small number of persons -- less than 200 persons in a population of over 147,000.

10. Using County Appellees' "total" population base, the deviation between District 6, with the lowest population, and District 9, with the highest population, is 8.62%.

CONCURRING AND DISSENTING OPINION BY
NAKAYAMA, J.
IN WHICH MOON, C.J., JOINS

I respectfully dissent from the majority's holding that the reapportionment plan for the County of Hawai`i (County), as crafted by the 2001 County of Hawai`i Reapportionment Commission (Commission), presents no equal protection violation.

As the majority notes, a reapportionment plan that exhibits a total population deviation of more than ten percent presumptively violates the right to equal representation secured under the fourteenth amendment to the United States Constitution. Brown v. Thomson, 462 U.S. 835, 842-843 (1983) (citing Swann v. Adams, 385 U.S. 440, 444 (1967)). That presumption of illegality may only be dispelled by showing that rational public policies outweigh the ill effects of an apportionment scheme that materially enhances the representational power of some at the expense of others. Mahan v. Howell, 410 U.S. 315, 326 (1973).

The Commission's reapportionment plan in this case is presumptively unconstitutional under Brown v. Thomson because it reflects a total population deviation of 10.89 percent. The excessive deviation was caused by the Commission's error in counting non-resident students and military personnel when calculating the ideal mean population for each of the voter districts.

I part company with the majority because the heightened deviation flowing from that error cannot, as Mahan v. Howell requires, be rationalized under any public policy the Commission was authorized to pursue. Section 3-17(f) of the Hawai`i County Charter (Charter) -- which enumerates the

only public policies the Commission may validly consider in fashioning district boundaries -- states:

> (1) No district shall be drawn to unduly favor or penalize a person or political faction;
>
> (2) Insofar as possible, districts should be contiguous and compact;
>
> (3) District lines shall, where possible, follow permanent and easily recognizable features;
>
> (4) Districts shall have approximately equal resident populations as required by applicable constitutional provisions.

Charter of the County of Hawai`i § 3-17(f) (1990). Inasmuch as subsection (4), under our interpretation today, forbids the inclusion of non-resident students and military personnel in the "resident population" count, the Charter's stated policy is to exclude these groups from the Commission's redistricting calculus. To allow the Commission to surreptitiously establish the district boundaries based on where these excluded groups reside -- in short, to employ, de facto, a "total population" count such as that used in this case -- undermines subsection (4)'s fundamental purpose of equalizing the populations among the districts without regard to non-resident students and military personnel.

Because no authorized public policy justifies the erosion of equal representation that the current plan engenders, the plan fails the constitutional test set forth in Brown v. Thomson and Mahan v. Howell. Accordingly, I must dissent.[1]

1. The County notes that the reapportionment plan's total deviation figure could be brought below ten percent by shifting "less than 200 persons" to other districts. That remedy would seem the better course than the majority's proposal to hold in place a reapportionment plan that is based on an inaccurate population count.

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STATE OF
HAWAI'I

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai'i nonprofit corporation; BRENDA J. FORD, SANDRA W. SCARR; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST; RONALD C. PHILLIPS; BEVERLY A. BYQUK, Plaintiffs, vs. COUNTY OF HAWAI'I; COUNTY CLERK, COUNTY OF HAWAI'I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI'I 2001 REAPPORTIONMENT COMMISSION, Defendants.	CIVIL NO. 02-1-0092 (HILO) FINAL JUDGMENT

A 51

FINAL JUDGMENT

Judgment is hereby entered in favor of Defendants County of Hawai'i; County Clerk, County of Hawai'i, and Lloyd Van de Car, Chairman, County of Hawai'i 2001 Reapportionment Commission and against Plaintiffs Citizens for Equitable and Responsible Government, Brenda J. Ford, Sandra W. Scarr, Stanley A. Boren, Floyd H. Lundquist, Marlene E. Lundquist, Ronald C. Phillips, and Beverly Byouk.

Pursuant to the Stipulation entered on January 6, 2003, there are no other issues or claims left for disposition.

DATED: Hilo, Hawai'i, Jan 24, 2003.

s/ Riki Amano
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

s/Patricia K. O'Toole
PATRICIA K. O'TOOLE
LESTER J. ISHADO
Attorneys for Defendants COUNTY OF HAWAI'I;
COUNTY CLERK, COUNTY OF HAWAI'I AND LLOYD
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s/C. OKAWA,
CLERK
THIRD CIRCUIT
COURT
STATE OF HAWAI'I

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai'i nonprofit corporation, et al.,	Civil No. 02-1-0092
Plaintiffs,	ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT OF THE COMPLAINT AND GRANTING PARTIAL SUMMARY JUDGMENT FOR DEFENDANTS
vs.	
COUNTY OF HAWAI'I, et al.,	
Defendants.	

A 53

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF THE COMPLAINT AND GRANTING PARTIAL SUMMARY JUDGMENT FOR DEFENDANTS

This matter came on for hearing before this Court on June 28, 2002 on Plaintiffs' Motion for Partial Summary Judgment. At the hearing, Plaintiffs were represented by Michael J. Matsukawa, Defendants were represented by Patricia O'Toole and Lester Ishado.

The Court considered on Motion, pleadings, evidence provided by both parties, affidavits, memoranda submitted by the parties, oral argument, and the files and records of this case, finds that there are no material facts in dispute and for the reasons set forth below, denies Plaintiffs' Motion for Partial Summary Judgment and grants partial summary judgment in favor of Defendants.

As is required the Court has considered all evidence, and any inferences to be drawn from the evidence in the light most favorable to the non-moving party, in this case, Plaintiffs.

Plaintiffs' motion asked for partial summary judgment on the grounds that the 2001 Reapportionment Commission used the wrong population base and that the 2001 County Council Redistricting Plan is unconstitutional because its total deviation from the ideal mean exceeds 10%.

The Hawai'i County Charter provides in § 3-17(f)(4) that "[d]istricts shall have approximately equal resident populations as required by applicable constitutional provisions." The Court finds that the adoption by the County Reapportionment Commission of a resident population base which did not exclude non-resident military personnel and their dependents and did not

exclude university students in the 2001 council redistricting plan was proper.

The Court also finds that there was no unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan adopted by the Reapportionment Commission.

Pursuant to Rule 56(d) of the Hawai'i Rules of Civil Procedure, the Court finds that there are no genuine issues of material fact, as to the two claims disposed of herein.

Thus, based upon the foregoing, the Court finds that as a matter of law, Defendants are entitled to partial summary judgment in favor of Defendants and against Plaintiffs on the claim of improper adoption of the resident population base in the 2001 council redistricting plan and on the claim of an unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan.

Dated: Hilo, Hawai'i, Jul 19, 2002.

s/ Riki Amano
JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM:

S/Michael J. Matsukawa

CONSTITUTION OF THE UNITED STATES

Amendment XIV - Citizenship rights. Ratified 7/9/1868.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive

or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CHARTER OF THE COUNTY OF HAWAI'I
STATE OF HAWAI'I

ARTICLE III
LEGISLATIVE BRANCH
COUNTY COUNCIL

Section 3-17. County Reapportionment Commission.

(a) There shall be a county reapportionment commission which shall establish the boundaries of the council districts.

(b) The initial reapportionment commission shall consist of seven members, two of whom shall be residents of the combined judicial districts of North and South Hilo, one from the judicial district of Puna, one from the judicial district of Ka'u, one from the combined judicial districts of North and South Kona, one from the combined judicial districts of North and South Kohala, and one from the judicial district of Hamakua. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.

(c) Each subsequent reapportionment commission shall consist of nine members. One member shall be a resident of each council district as established by the previous reapportionment commission. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.

(d) The year 1991 and every tenth year thereafter shall be reapportionment years. The reapportionment commission shall be appointed and confirmed by March 1 of the reapportionment year, and shall file a reapportionment plan with the county clerk by December 31 of the reapportionment year. The reapportionment commission

shall be dissolved after the filing of the reapportionment plan.

(e) The county clerk shall furnish all necessary technical and secretarial services for the reapportionment commission. The council shall appropriate necessary funds to enable the commission to carry out its duties.

(f) The reapportionment commission shall be guided by the following criteria in establishing the boundaries of the council districts:

(1) No district shall be drawn to unduly favor or penalize a person or political faction;

(2) Insofar as possible, districts should be contiguous and compact;

(3) District lines shall, where possible, follow permanent and easily recognizable features;

(4) Districts shall have approximately equal resident populations as required by applicable constitutional provisions.

(g) The district boundaries as established by the reapportionment commission shall be in effect at the first regularly scheduled council election following the filing of the plan and for any subsequent council election. The district boundaries in effect prior to the filing of the reapportionment plan shall remain in effect during the duration of the term of all councilmembers elected or appointed to represent such districts until the expiration of the full term of such councilmembers, including any election held to fill an unexpired term under section 3-4. (Added Gen. Elec. 1990)

U.S. Code, Title 28, Part IV, Chapter 81, § 1257

§ 1257. State courts; certiorari (Release date: 2005-09-29)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Rules of the Supreme Court of the United States

Part III. Jurisdiction on Write of Certiorari

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court, U.S.
FILED

051325 DEC 19 2005

OFFICE OF THE CLERK

(2)

No. _____

In The Supreme Court Of The United States

BRENDA J. FORD, Petitioner,

v.

COUNTY OF HAWAI'I; COUNTY CLERK, COUNTY OF HAWAI'I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI'I 2001 REAPPORTIONMENT COMMISSION, Respondent.

On Petition for Writ of Certiorari

to the

Supreme Court of the State of Hawai'i

BRENDA J. FORD, Pro Se
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Captain Cook, HI 96704
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APPENDIX 2

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PLEASE SEE NEXT PAGE TO BEGIN APPENDIX 2.

A 62

HAWAI'I COUNTY REAPPORTIONMENT COMMISSION

1st Session
Thursday, May 3, 2001
Hawai'i County Councilroom
25 Aupuni Street
Hilo, Hawai'i

(Partial Transcription)

The Hawai'i County Reapportionment Commission, having been duly sworn in by Managing Director Dixie Kaetsu at 9:45 a.m., and with opening remarks by the Honorable Mayor Harry Kim, County Clerk Al Konishi called the roll at 10 a.m.

PRESENT: Commissioner Lawrence J. Balberde
Commissioner Jack L. Ferguson
Commissioner John J. Fernandez
Commissioner Jeanne A. Fuller
Commissioner Mark Van Pernis
Commissioner Byron H. Toma
Commissioner Lloyd X. Van De Car
ABSENT: Commissioner Antoinette Bello
Commissioner Abbie Napeahi

ALSO PRESENT WERE:
Lincoln Ashida, Corporation Counsel
Barbara Hashimoto, Planning Legislative Assistant
Wendell M. Hatada, Executive Assistant to Mayor
Rodney Kaido, Civil Service Dept.
Al Konishi, County Clerk
Bobby Jean Leithead-Todd, County Council Member
Patricia Nakamoto, Elections

Rex M. Quidilla, Administrative Assistant, Office of Elections
John Ray, Charter Commission Chair
David J. Rosenbrock, Project Manager, Reapportionment Office of Elections
Natalie Santos, Parks Department Secretary
Jean Viernes, Mayor's Secretary
Dwayne Yoshina, Chief Election Officer
Karin Dahlgren, Council Services Supervisor

Page 9:

YOSHINA: "...three basic steps that are involved in reapportionment. Not to try to be a pedagogue or anything here, but just to kind of give you an idea of what you have to do; and I'm taking this from what I consider to be a pretty good primer on reapportionment. It was written in 1978, so some of the information in here is limited because the cases--we have case law now that have changed some of this;

Page 12:

MR. YOSHINA: You always want to avoid---

MR. BALBERDE: Problems.

MR. YOSHINA: Suits. In 1981, we had the Federal Masters that were designated to really draw the maps for the State of Hawaii. I would recommend that you try to avoid that;

Page 38:

MR. YOSHINA: Yes, what I would suggest is that you take that time and you form all your policy decisions.

Page 50:

CHR. VAN DE CAR: You had a question?

MS. FULLER: (From the audience, at times inaudible) Yeah, I was just wondering about noncitizens, military.

MR. ROSENBROCK: Well, I'm almost positive they're going to be minused out, yeah?

MS. FULLER: (From the audience, at times inaudible) What do you think?

MR. ROSENBROCK: Well, I don't set the rule. I know what they used the last time. I don't---I'm not aware of any classification that it said, you know, that we're going to include noncitizens. I mean, they don't exist, right?

Page 68:

MR. VAN PERNIS: (From the audience, at times inaudible) We already have the maps showing the . . . and are we also 3-4 weeks away from the concept of designating a starting line and then run the nine districts . . . .

MR. YOSHINA: Yes, what I would suggest is that you take that time and you form all your policy decisions.

Page 69:

CHR. VAN DE CAR: I think your suggestion is a good one, that we spend the time, before we have the data, making some policy decisions on how to use it. My question then is to you, Al, in terms of support staff and notice requirements, and those sorts of things. When are we likely---how do we go about, I guess, hiring support staff.

Page 73:

MR. KONISHI: You know, one of the things that we passed out, what I passed out right now, was the reapportionment time table that was used the last time around. And, you know, we just passed it out for purposes of your information; and, you know, this could guide you as sort of

a road map. You know, one of the things that, I guess, the Commission did right up front was to solicit public input, I guess, you know, before making the, you know, the big policy decisions on various things; and as you can see by the schedule, what they did was, they went around and I guess, you know, did a road show to gather sentiment from the public about these various issues, because--and I think Mr. Van Pernis has, I guess, the spirit of his comment is, you know, if you don't get out there to West Hawai'i and some of these other places, you know, these people might not be afforded a fair opportunity to make their feelings known.

Page 74-75:

CHR. VAN DE CAR: Okay, yeah, what I was going to suggest is that in addition to the rules being on the agenda for our next meeting, that maybe we try to adopt a time table at our next meeting, and decide things like whether we're going to go and do a road show, and, you know, where and when, and try and at least get started figuring out what we're going to do.

And, you know, one of the things Mr. Yoshina suggested is trying to make policy decisions about who to include, who to exclude, whether to maybe---what sort of starting points to look at, what makes sense as a starting point.

Actually, I'm not sure that I wouldn't rather get public input before we even do that, even those issues that I think are purely policy issues that maybe this Commission can make about who to exclude and who to include, maybe the public, you know, has some ideas, and we certainly don't know everything, and might want to hear from them on those issues as well. Mr. Van Pernis.

HAWAI'I COUNTY REAPPORTIONMENT COMMISSION

Second Session
Friday, June 22, 2001
9:00 a.m.
Hawai'i County Councilroom
25 Aupuni Street
Hilo, Hawai'i 96720

(Partial Transcription)

CALL TO ORDER/ROLL CALL

Chair Lloyd X. Van De Car called the meeting of the Hawai'i County Reapportionment Commission to order at 9:15 a.m..

Members present are as follows:
Vice Chair, Mark Van Pernis
Commissioner Lawrence Balberde
Commissioner Patrick Kahawaiola'a
Commission Steven Pvaao
Commissioner Jeanne Fuller
Commissioner Jack L. Ferguson
Commissioner John J. Fernandez

ALSO PRESENT WERE:
Dudley Akama, Counsel
Patricia Nakamoto, Elections
Ed Kozohara
Al Konishi, County Clerk
Curtis Tyler, Member, Hawai'i County Council
Julie Jacobson, Member, Hawai'i County Council
Jason Armstrong, Reporter

Page 19:

J. C. TYLER:... Now, with respect, really with the work at hand, that's kind of, policies and procedures. Some of you, I guess all of you, when you came for confirmation, hear me speak strongly about the need to adhere to the Charter provisions, under Section 3-17, regarding the County Reapportionment Commission. I speak specifically of..of Paragraph No. F, on page 6, of the Hawaii County Charter. And it says, as follows, as we get into the record, …."the Reapportionment Commission shall be guided by the following criteria in establishing the boundaries of the Council districts". Note the word "shall".

No. 1, no district shall be drawn to unduly favor or penalize a person of a political faction." That's the no political thing.

No. 2. …"insofar as possible, districts should be continuous and compact.

No. 3. And this one is to me the most important one, and certainly at least one of the most important ones. .."District lines shall "…that's another shall…"where possible, follow permanent and easily recognizable features."

And finally, as we all know, districts shall be approximately equal resident populations as required by applicable constitutional provisions…"

Page 74-75:

M. VAN PERNIS: Yeah, first of all, I think what we talked about at the last meeting, we need to decide what population are we including, and the issue was brought up to you, to include everybody or do you exclude groups

such as, the military which is an issue on Oahu, or non-resident, or illegal aliens, which may be an issue someplace but I don't think its much of an issue on this island.

And I've done some inquiry and got some feedback and there's something like 20-30 people currently stationed here that I know of up in Pohakuloa, in the military and maybe, in the Hilo side, and so I really don't think that the mili...any of these things that may be issues elsewhere should be issues for us.

I would propose that we make a motion, to basically include all people. In other words, all the people that the census counted is included because, whether they vote or not, or whether they're young or old, or military or not, they all use county services, they all pay taxes in some form or shape and they all need representations. So I think, one thing we have to do is say, what segments of the population, the census-counted population is gonna be include in our activities. And I suggest that everybody is because otherwise...

J. FERGUSON: I would so move, Mr. Chairman.

CHAIR VAN DE CAR: Is there a second?

J. FULLER: I second.

CHAIR VAN DE CAR: Is there any other discussion about the motion? (pause)

Hearing none, all those in favor, say aye.

ALL: Aye.
CHAIR VAN DE CAR: Opposed? (pause)

Motion is carried.
So we will then be...then in our work we can consider everyone listed in the census data.

M. VAN PERNIS: That's correct.

CHAIR VAN DE CAR: All right.

J. FERGUSON: There's a question, Chair.

CHAIR VAN DE CAR: Yes?

P. NAKAMOTO: May I ask a question? Will this be total resident population? So that we have a definition.

M. VAN PERNIS: Yes.

CHAIR VAN DE CAR: Yes. All right.

A 70

TRANSCRIPT OF PUBLIC HEARING
October 8, 2001
HALE HALAWAI
Kailua-Kona, Hawaii 96740
6:30 a.m.
[Partial Transcript]

Public hearing convened at 7:10 p.m. with Chair Lloyd Van de Car presiding. In attendance were the following:

MEMBERS: Lloyd Van de Car Mark Van Pernis,
John Fernandez Steven Pavao
Lisa Barton Jack Ferguson
Patrick Kahawaiola'a Jeanne Fuller

STAFF: Ed Kozohara, Elections
Patricia Nakamoto, Elections
Gina Bernabe-Haina, Elections
BrendaLynn Domondon, Secretary

COUNSEL: Patricia O'Toole

The public hearing convened at 6:30 with Chair Van de Car presiding.

Page 2

CHAIRMAN Van de CAR: The County Charter rules are specific regarding the reapportionment and it has 4 guidelines that we must follow. They are that we are to re-draw the county council districts so that no district is drawn unduly favor or penalize the person or political faction. That, insofar, as possible districts should be contiguous and compact that district lines shall, where possible follow permanent and easily recognizable features and finally, districts shall have equal resident populations as required by applicable constitutional provisions...

Page 3

So there's no misunderstanding this Commission is the final drop to the reapportionment plan. Its not submitted to the County Council for approval or anything else. Its done when we're done. It doesn't mean it is done subject to challenges, we're trying to avoid that best we can by following the rules. And there is no other body that oversees us in the terms of we adopting... adopting the plan. Once its done here, that's the plan.

Page 5

CHAIR: Brenda Ford?

B. FORD: Um...I'm Brenda Ford. I live in Capt. Cook, South Kona. Um....I'm handing out some copies, I'm sorry they're not real good, these are the deviations based on the plan that I'm going to first explain and then show you. I got this assignment one week ago, and so I want you to understand where I'm coming from. And Charles isn't here right now, that's Chucky Flaherty. He's in another meeting and he's trying to get to this one. So if he gets here in time, I'll let him explain the map portion.

First of all, trying to do this in one week, h...Char...Chuck and I developed a tremendous appreciation for the challenge that this Commission is faced. We came to this project from a little different perspective. We didn't have this mapping function, this mapping function is only after the County Elections Office's and its not available to anybody else, and the raw date that went into this is the U.S. Census deadline without excluding any of those little categories that I'm going that I'm going to talk about in a few minutes. And we didn't want to do that. We wanted to get the exclusions in there, and we were partially successful. So anyway, I just want to say that um...this is a very difficult assignment and not only for us, but we